

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF AND APPENDIX
FOR APPELLANT**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM 1941.

No. 7911

797

WILBUR E. DOW, *Appellant*,

v.

HAROLD L. ICKES, Secretary of the Interior, and
HENRY L. STIMSON, Secretary of War, *Appellees*.

**APPEAL FROM AN ORDER OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE DISTRICT OF
COLUMBIA.**

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court of the United States for the District of Columbia, in favor of the appellees, Harold L. Ickes, Secretary of the Interior, and Henry L. Stimson, Secretary of War, dismissing appellant's action at law. The essential pleadings are set forth in the Appendix to this brief (Appellant's App. 1, 9, 42, 43).

The lower court has jurisdiction of this case under D. C. Code, Title 18, c. 3, Section 44 (R. S. D. C. Sec. 763, Act of

Feb. 27, 1877, 19 Stat. 253, c. 69, Sec. 2; March 3, 1901, 31 Stat. 1200, 1002, c. 854, Sec. 64, 66, 67, 83).

This court has jurisdiction of this appeal to review the order of the court below under D. C. Code, Title 18, c. 2, Sec. 26 (Act of Feb. 9, 1893, 27 Stat. 435, c. 74, Sec. 7; Act of March 3, 1901, 31 Stat. 1255, c. 854, Sec. 226; Act of March 3, 1921, 41 Stat. 1312, c. 125, Sec. 12).

STATEMENT OF THE CASE.

This is an appeal from an order entered by the Court below (Appellant's App. 42, 43), dismissing appellant's, Wilbur E. Dow, compliant in an action at law to adjudicate his rights to fish in the waters of Alaska under a statute enacted by Congress and to test the validity of the rules and regulations as promulgated by the Secretary of the Interior in pursuance of his authority under that statute.

By an Act of Congress of June 6, 1924, Sec. 1, as amended June 18, 1926, Title 48, U. S. C. Anno. Sec. 222, entitled, "An Act for the Protection of Fisheries in Alaska and for other purposes," to the Secretary of Commerce (Interior) was delegated the power to make rules and regulations administering the provisions of that Act.

On or about the 29th day of November 1939, the appellant applied to the Bureau of Fisheries of the Department of the Interior as required by the Secretary for the allocation by that Bureau of two sites wherein he might erect lawful structures called traps for the capture of salmon in the waters of Alaska (Appellant's App. 2).

Prior to that date, the appellant had duly applied for and received his territorial license from the Treasurer of the Territory of Alaska and duly made application to the War Department for a permit for the construction of such traps on the two sites as described above.

On January 6, 1940, the Appellee, Harold L. Ickes, Secretary of the Interior, announced the issuance of the Alaska fishing regulations of the Bureau of Fisheries of the Depart-

ment of the Interior for the season of 1940, in which the sites requested by the appellant were not included.

At no time are sites for the erection of traps ever included in the regulations of the Bureau of Fisheries of the Department of the Interior except at the specific request of some person or corporation, there being no general open area for the erection of fish traps in any area of Alaska, and each site included in the regulations is so microscopic in area as to permit the erection of only a single trap.

In the year 1927, the Bureau of Fisheries of the Department of the Interior closed all general open areas in the waters of the Territory of Alaska to fishing by trap and has since that date required a specific request be made by a firm or individual for a specific site exactly located to degrees, minutes and seconds of latitude and longitude, after which the Department in the regulations for the ensuing year, announced whether or not the specific site requested would be opened to fishing for the forthcoming season.

All the necessary piling and other equipment which takes months to accumulate for each trap is available at or near the site used the previous year. Those who presently have the use of a site have a very distinct advantage over any one wishing to preempt such site, as it would take months of preparation to get the material in, and the present user would have had his trap commenced and eventually finished before the party desiring to preempt such site could get started or complete his own trap.

With the exception of three that are privately owned, all traps in the Aleutian Peninsula and the Western part of Alaska are owned by three large corporations. In Southern Alaska, which constitutes the only other area of Alaska open or suitable for trap fishing, 60 per cent of the traps are owned by five large companies and 80 per cent of all the traps are owned and controlled by ten companies.

On January 31, 1941, the following press release was issued by the appellee, Harold L. Ickes, as Secretary of the Interior:

"Secretary of War Stimson announced today that acting upon a request from the Honorable Harold L. Ickes, Secretary of the Interior, and in the interest of the Alaskan salmon fishing industry, particularly during the present emergency, the War Department would continue for another year its former method of regulating the construction of fish traps in navigable waters of Alaska begun in 1935 as a result of an agreement entered into between the two departments. Mr. Stimson stated that this further extension of one year is for the purpose of enabling the Department of the Interior to secure better legislation for the administration of the salmon fishing industry.

January 31, 1941."

Under the agreement as herein set forth, Henry L. Stimson, as Secretary of War, issues only one War Department permit to erect a trap on each site described in the Bureau of Fisheries Regulations. This is done solely on his own responsibility contrary to the law, and, as a result, these fish trap permits issued by Henry L. Stimson as Secretary of War, are sold and leased as interests in property directly contrary to the statement on the face thereof, that such permits are not to be deemed an interest in property.

On May 3, 1940, appellant filed his complaint in an action to adjudicate his rights. On February 19, 1941, he filed his reamended complaint. (Appellant's App. 1).

On March 14, 1941, an order was entered dismissing appellant's complaint as to appellee, Harold L. Ickes, Secretary of the Interior (Appellant's App. 42), and on March 26, 1941, an order was entered dismissing the complaint as to appellee, Henry L. Stimson, Secretary of War of the United States. (Appellant's App. 43).

STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED.

The statutes and rules involved are:

1. Section 1 of the Act of Congress, June 6, 1924, 42 Stat. 464, as amended June 18, 1926, 44 Stat. 752, reading as follows:

“SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska, the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved, the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein, it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribed under the authority herein given: Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein

shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress: Provided, further, that the Secretary of Commerce is hereby authorized to permit the taking of fish or shellfish, for bait purposes only, at any or all seasons in any or all Alaskan Territorial waters."

2. Rules and Regulations appearing Federal Register Act, Sec. 7, (July 26, 1935, 49 Stat. 500, 502) as appears in 4 Fed. Reg. 908 (D. I) and the amendments effective February 24, 1940, as appearing in 5 Fed. Reg. 747 (D. I.)

3. Sherman Anti-Trust Act, 26 Stat. 209, c. 647.

STATEMENT OF POINTS.

The points upon which Appellant intends to rely are:

1. The Court has the power of review to test the validity of the rules and regulations promulgated by the Secretary of the Interior for the administration of the statute involved, namely, Act of Congress, entitled "An Act for the Protection of the Fisheries of Alaska and other purposes".

2. Congress, by that statute, has reserved to all citizens of the United States the common right to fish in the waters of Alaska.

3. Congress has reserved to Appellant, a citizen of the United States, his right to fish in the waters of Alaska along with others in that category and denying him that right to earn his livelihood in his chosen calling, is causing him injury, entitling him to a remedy at law.

4. Congress specifically prohibits the granting to any individual, directly or indirectly, any exclusive or several right to fish in the waters of Alaska.

5. Contrary to any provisions of law, the Bureau of Fisheries of the Department of the Interior has made it mandatory that an application must be made for the allocation of trap sites by anyone desiring to fish by trap in the waters of Alaska.

6. That all sites included in the rules and regulations as areas where trap fishing is permitted are only those specifically requested by individuals or corporations.

7. Failure to include a site requested excludes that individual from trap fishing anywhere in the waters of Alaska while granting it to those whose sites, as applied for, are included.

8. A War Department permit is a necessary requisite to the erection of a trap in the waters of Alaska.

9. At the request and by agreement with the Secretary of the Interior, the Secretary of War issues only one War Department permit to a site included in the rules, and to the first applicant to apply, who would in every instance be the individual or corporation requesting the allocation.

10. The procedure as outlined in Points 5, 6, 8 and 9 operates so as to grant an exclusive and several right of fishery to a very few individuals and corporations to the exclusion of all other citizens of the United States, also helping to create a monopoly in the industry.

11. The Court in its review, must look to the practical application to determine the validity of the rules and regulations, and where they are not within the standard as established in the statute, the Court must declare such regulations null and void.

SUMMARY OF ARGUMENT.

Congress may constitutionally delegate to an executive officer the power to make rules and regulations to administer its laws, however, the enabling act must declare the policy of the law-making body and provide a sufficiently

complete and comprehensive standard by which the executive officer must be guided. Under no circumstances may he deviate from that standard, or go beyond the bounds. The natural tribunal before which such rules and regulations may be tested to determine whether or not they keep within the confines of the standard as set forth in the Act, are the Courts of the United States.

The fishery statute was enacted to protect and conserve the salmon fishing in the waters of Alaska, and provides that no exclusive or several right of fishing shall be granted, nor shall any citizen of the United States be denied his right to fish where fishing is permitted.

The appellant's position in the Court below was that the rules and regulations as promulgated by the Bureau of Fisheries of the Department of Interior have injured him in depriving him of his legal right to fish in the waters of Alaska. It remains for the Court to inquire into the operation of all such rules and regulations to determine whether or not they are reasonable and within bounds.

The appellant in this action, Wilbur E. Dow, a citizen of the United States, has been actively engaged in various features of the salmon business in Alaska and Puget Sound and the Columbia River for the past twenty years. The salmon business has been his principal source of income for many years.

The appellant expended a great deal of effort, time and expense in prospecting for what he considered profitable sites for trap fishing, and when he attempted to exercise his right, was told that he must make application to the Bureau of Fisheries, Department of Interior, for the allocation of the designated sites, file same with the Bureau of Fisheries, and then wait for the fishing regulations to be issued for the forthcoming season. If the sites were included in such regulations, he could exercise his right to fish. On January 6, 1940, the Alaska Fishing regulations were issued, but none of the sites requested by appellant were included.

A careful survey of the sites enumerated disclosed that they were those held and operated by a few individuals and

corporations, and that each area designated was large enough to accommodate only one trap. It also disclosed that while the application must be made every year, most of these individuals and corporations have succeeded in retaining the sites they desire from year to year, actually granting to these individuals and corporations, an exclusive and several right to fish in certain areas of the waters of Alaska, contrary to the express provisions of the statute.

As a fish trap is such a structure as projects into the navigable waters, it is also required before a trap can be built, that a permit be obtained from the War Department for such a structure at that point. By an agreement between the Secretary of the Interior and Secretary of War, which is not denied, the War Department will issue only one permit to a site to the first applicant. The net result is that when the Department opens a site for fishing, it does not open it for all those who have the right to fish, but only for the individual or firm who made application and secured the War Department permit.

The Court in its review should look to the practical application of the rules and regulations to determine their validity and by so doing, they will find that the situation in the industry today has reverted to the practices and evils that Congress looked to eradicate and rectify in passing the statute involved. It necessarily follows that when the Court determines that the rules and regulations are not within the policy and standard, as established, it must declare them null and void. In declaring the present rules and regulations covering trap fishing in the waters of Alaska null and void, the Court does not prevent the Secretary from fulfilling his obligations under the statute. There are any number of other valid methods of regulating trap fishing in the interest of conservation.

Such being the case, the Court below erred in granting appellee's motion to dismiss Appellant's complaint.

ARGUMENT.

Point I.

Rules and Regulations Made by an Executive Officer Controlling Alaska Fisheries Are Subject to Review by the Courts to Test Their Validity.

The Appellant has no quarrel with the fact that it is becoming a well recognized policy of law that the legislative body may delegate to an executive officer broad powers to make rules and regulations for the administration of laws it has enacted. However, it is equally recognized by the Supreme Court that the enabling act must declare the policy of the law-making body and also provide a sufficiently clear and comprehensive standard or yardstick by which he must be guided. Under no circumstances may he go beyond the confines of the policy and standard as declared.¹

The words of the Court in *Payne v. Central Pacific Railway Co.*, affirming 46 App. D. C. 374, 255 U. S. 28, might very well have been said of the instant Act, it

“does not clothe the Secretary with any discretion to substitute his judgment for the will of Congress as manifested in the granting act”.

¹ “Because regulations made by executive officers are valid only as subordinate to a legislative policy sufficiently defined by statute, it must, moreover, be within the frame work of such policy”.

Brown v. Humble Oil & Refining Co., 126 Tex. 296; 83 S. W. (2d) 935; 87 S. W. (2d) 1069.

A. L. A. Schechter Poultry Corp. v. U. S., 295 U. S. 495; 79 L. Ed. 1570; 55 Sup. Ct. 837.

Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. 446; 55 Sup. Ct. 241.

Charles Uhden v. Greenough, 181 Wash. 412; 43 Pa. (2d) 983.

Roberts v. U. S., 176 U. S. 221, 231.

The Supreme Court has laid down certain rules and standards covering considerations under which the delegation

can be scrutinized. The most lucid would appear to be the one "whether the provision is sufficiently definite to enable one reading it to know his rights and obligations thereunder".

Peo. ex rel Rice v. Wilson Oil Co., 364 Ill. 486; 4 N. E. (2d) 847.

The specific act involved in this controversy in the appellant's judgment, measures up to this test and by it he feels that he cannot be denied his right to fish by trap as long as trap fishing is permitted. The Courts go on to declare that although the power to make rules may be validly delegated, it must be exercised in a reasonable manner; otherwise, in spite of a valid existence of power, acts under it will be invalid because constitutional rights of persons are violated by the unreasonable way in which the delegated power is exercised, which is exactly what has happened in the instant case. (To be taken up in more detail in the following points.)

In delegating to the Secretary, the power to make rules and regulations covering fisheries in the waters of Alaska in the interests of conservation, Congress has placed a positive limitation on that power, namely, that no citizen is to be denied his right to fish where fishing is permitted. To violate that standard is going beyond his powers and is an abuse of any discretion vested in him under the Act.

It is conceivable that the Secretary might argue to the point that when he opens a trap site, it is open to anyone who wishes to erect a trap thereon, and, therefore, the regulation is valid. On its face, this looks like a very innocent and proper regulation but the Court cannot stop at that point. To further the ends of justice and the purpose of the Act, it must go beyond to the practical application. There is no doubt that the legislature, in providing its standard, "No exclusive or several right of fishing shall be granted therein, nor shall any citizen of the United States be denied the right to take * * * fish * * * where fishing is permitted", had in mind not only positive acts of prohibition but as well, any regulations which in practical operation would definitely limit trap fishing to a very few to the complete exclusion of

all others who wished to fish by trap in the waters of Alaska, which is the situation as it now exists. (To be taken up in detail in the following points.)

It is within the province of the Court in all cases to test the rules and regulations to determine whether or not they are reasonably directed to the accomplishment of the purposes and policy of the statute under which they are made.

Hubbell v. Higgins, 148 Iowa 36; 126 N. W. 914.

Welsh v. Swasy, 193 Mass. 304; 79 N. E. 745.

Sabre v. Rutland Ry. Co., 86 Vt. 347; 85 At. 693.

Point II.

Congress Has Expressly Reserved to All Citizens of the United States the Common Right to Fish in the Waters of Alaska.

The right to fish in the waters of Alaska is a right common to all citizens of the United States subject to the control of Congress, which Appellees do not deny. On June 6, 1924, Congress exercised its power of control in the Act of that date (43 Stat. 464, as amended June 18, 1924, 44 Stat. 752) entitled, "An Act for the Protection of Fisheries in Alaska and for other Purposes", but expressly reserved to all citizens of the United States the right to fish wherever fishing is permitted.

Point III.

Rules and Regulations Depriving Appellant of His Legal Right to Fish in the Waters of Alaska is an Injury Entitling Him to His Remedy at Law.

The Appellees cannot deny that Congress intended that the provision in the statute protecting the rights of all citizens of the United States to fish in the waters of Alaska where fishing is permitted, should cover the Appellant, a citizen of the United States, and that it certainly never intended to exclude him from that class without just cause, but extended that protection to him as well—thus granting to him a legal right which the Courts must protect—a fundamental principle of our government.¹

¹ *Hubbell v. Higgins* (*supra*).
Welch v. Swasy (*supra*).

The appellant, Wilbur E. Dow, has been actively engaged in various features of the salmon business in Alaska and Puget Sound and the Columbia River for the past twenty years. The salmon business has been his principal source of income for many years.

In September of 1939, appellant journeyed from his home in Seattle, Washington, to Washington, D. C. to request the Bureau of Fisheries to open certain sites for the erection of fish traps by which he might pursue his calling. He was advised by the Bureau of Fisheries of the Department of Interior, through Mr. Charles E. Jackson, Acting Commissioner, to have his application in for the specific sites requested on or before December 1st, 1939, and his application was duly filed on or about November 29, 1939. The geographical locations of these particular sites designated by certain degrees, minutes and seconds of latitude and longitude are fully set forth in the complaint.

On January 6, 1940, Alaska Fishing Regulations were issued for the forthcoming season by Harold L. Ickes, Secretary of the Interior, but none of the sites requested by appellant was included therein. As fishing is the only business with which appellant is adequately familiar to earn a proper living, and being unable to lease any traps, he was unable to operate at all.

Point IV.

The Present Methods of Control Operate to Grant to a Few Individuals and/or Corporations the Exclusive and/or Several Rights to Fish by Trap in the Waters of Alaska to the Exclusion of All Other Citizens of the United States Contrary to the Express Provisions of the Statute.

The reason given by the Secretary of the Interior for refusing to open additional sites for fishing was one generally of conservation. In the press release of January 6, 1940, issued by Secretary of the Interior, Harold L. Ickes, and which accompanied the signing of the Regulations, it was stated:

“The regulations provide for the closure of twenty fish trap sites most of them in Southeastern Alaska, the

others being in central and western parts of the Territory. For the second consecutive year, the Regulations do not authorize any exchanges or trade of fish trap sites”.

From the excerpt above, it can be seen that with the exception of the twenty closed sites, the balance of the sites, some 500 in number, were “frozen” for the coming year.

Four large corporations own or control one hundred per cent of the fishing operations in Southwestern Alaska and in excess of 80 per cent of the operations in Southeastern Alaska; these two areas comprise approximately 90 per cent of the entire Alaska Fishing industry. Of the twenty sites closed, all were either dummies on which proper traps had never been erected or which had been abandoned due to unprofitable operation, or traps owned by small individuals, and their combined catch was less than any one of the more successful traps operated by the large companies, and of no real consequence to the industry.

Under the present rules of the Department, any citizen wishing a fish trap site applies for same by stating the exact latitude and longitude in degrees, minutes and seconds of the point of land where he wishes to locate his trap. A time limit on the application is usually set by the Department, and for the current season of 1940, the dead line for applications was December 1, 1939. The necessary prerequisite of such application is that the applicant shall have his Alaskan fishing license covering the identical sites requested of the Department of the Interior. For such purpose the applicant must put up \$200.00 for each site with the Treasurer of the Territory. The appellant complied with these prerequisites before filing his application with the Department on November 29, 1939. As a fish trap is such a structure as projects into navigable waters, it is also required before the trap can be built, that a permit be obtained from the War Department for a structure at that point. As it is obvious that the War Department will not grant more than one permit to a party to build a structure at one point, it is customary for the applicant to apply for his War Department permit at the same time that he applies to the Bureau of Fisheries for the opening of the site, and

in this fashion, if the site is opened, he becomes the first applicant before the War Department for such site and so maintains his priority.¹ The result of this arrangement is that when the Department of the Interior opens a site for fishing, it does in effect open it for the individual or firm that made the application, although he is not specifically named in the announcement in the Regulations. The Department has never yet opened a site for fishing except at the request of some firm or individual. As War Department permits run for three years and are renewable, this in effect permanently reserves to the successful applicant that particular site.

Under an agreement as set forth in a press release of the Department of the Interior,¹ Henry L. Stimson, as Secretary of War, issues only one War Department permit to an erected trap on each site described in the Bureau of Fisheries Regulations. This is done solely on his own responsibility contrary to the law, and as a result, these fish trap permits issued by Henry L. Stimson, as Secretary of War, are sold and leased as interests in property, directly contrary to the statement on the face thereof, that such permits are not to be deemed an interest in property.

War Department regulations, Ch. VI, issued February 1, 1937, Section 5461, states: "... Although issued to a specific party, the assent is not limited to execution of the work by that party and may be availed of by the assignees or purchasers of the property affected, provided the terms of the instrument are complied with."

As a result of the circumstances set forth above, those already in possession of trap sites have been, and are per-

¹ Press Release of Department of Interior, dated Jan. 31, 1941:

"Secretary of War Stimson announced today that acting upon a request from the Honorable Harold L. Ickes, Secretary of the Interior, and in the interest of the Alaskan salmon fishing industry, particularly during the present emergency, the War Department would continue for another year its former method of regulating the construction of fish traps in navigable waters of Alaska begun in 1935 as a result of an agreement entered into between the two departments. Mr. Stimson stated that this further extension of one year is for the purpose of enabling the Department of the Interior to secure better legislation for the administration of the salmon fishing industry."

² *Canoe Pass Packing Co. v. U. S.*, 270 Fed. 533.

² *Columbia Salmon Co. v. Berg*, 5 Ala. 538.

mitted to be, the only possessors of trap sites in Alaskan waters. Others may apply but it does them no good. Due to this procedure, the status quo in Alaskan fisheries is maintained for the benefit of those to whom sites have been granted and to the great detriment and ruination of those to whom they have been denied, contrary to the express provisions of the law.³

Point V.

The Court in Its Review Must Look to the Practical Application to Determine the Validity of the Rules and Regulations and Where They Find They Do Not Operate Within the Standard as Established in the Statute, Must Declare Them Null and Void.

The court, as a tribunal for the administration of justice, must look beyond the printed page of rules as promulgated by the Secretary to the practical application, of those rules and regulations, in the affairs of men as they are ordinarily conducted. In testing the constitutionality of a law, the general rule is: "That in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by *its natural* and reasonable effect". (Emphasis ours)

Little v. National Bank, 161 Ill. 497; 44 N. E. 984.

North Laramut Land Co. v. Hoffman, 268 U. S. 276; 69 L. Ed. 953, 45 Sup. Ct. 491.

The same must be true in testing the validity of the administration of those statutes—a matter of equal importance.

The attorneys for the appellant felt that the results as outlined above were never intended by those who enacted the statute above referred to and while the wording of the statute itself seemed clear beyond dispute, they looked to the Congressional Record for the debates in both the

³ Act of Congress, Sec. 1, June 6, 1924, 42 Stat. 464, as amended June 18, 1926, 44 Stat. 752.

³ Sherman Anti-Trust Act, 26 Stat. 209, c. 647.

House and Senate at the time this bill was passed to determine a reason for the bill and a clearer interpretation of its operation as intended by that law-making body and the results were well worthwhile.

It appears that Mr. Herbert Hoover, at that time Secretary of Commerce (1924) in which Department lay the Bureau of Fisheries, in an effort to conserve or reduce the catch of salmon in Alaskan waters, divided these waters up into districts which he allocated to four large fish packing corporations who owned or controlled all but a small part of the industry. The Secretary's reason for doing so, as described by Senator Jones of Washington during the course of the Senate debate, was that as these large corporations kept a careful check on the amount of fish which they took and canned, the Government would be far better off to grant exclusive privileges to these four corporations, restrict their catches and operations to within the desired limits and thus best serve the interests of conservation. This action was immediately set upon by Mr. Sutherland, the delegate from Alaska, residents of the Territory and all the smaller fish interests who were thus frozen out. The uproar became so loud that a bill was introduced which is now the present law referred to above, to prevent this practice. As this matter arose at the same time as the Elk Hills Naval oil lease and the Teapot Dome affair, great importance was attached to the debate on the Fisheries bill and from the remarks of the Congressman and Senators who took part in the debate there can hardly be any doubt as to precisely what was meant by the terms of the Act.

In the House, Mr. Sutherland, Delegate from Alaska, charged time and again that the Bureau of Fisheries did not have the interests of the people of Alaska or the good of the industry at heart, but for some selfish reasons, desired to stand in well with the large fish packers. The then Commissioner of Fisheries, Commissioner O'Malley, was later asked to resign, as was his successor, Commissioner Bell, whose resignation dates from less than two years back. Such was the tenure of office of these two commissioners that for a pe-

riod of 22 years the Bureau of Fisheries was headed by men who left the Department under a cloud. In the past year several of the Commissioners' principal assistants in Seattle and Alaska have been summarily removed but the policies of the Department, insofar as the opening of fish trap sites is concerned, have remained unchanged. The facts set forth above and some of the Congressional discussion found below are merely to illustrate that the Bureau of Fisheries has not been without culpable fault for many years back.

As part of the discussion which took place in the House on H. R. 8143, which later became the Act above referred to on the point of removing traps from streams, the Congressional Record for the 68th Congress, 1st Session, on Page 5968, the following colloquy took place. Mr. Sutherland, Delegate from Alaska, had the floor.

“Mr. Raker. I have been receiving a lot of telegrams in regard to this bill—for instance, from the Bristol Bay Packing Co., the Griffin Durney Co., and the Northern Pacific Trading & Packing Co. Why are they so opposed to your amendments?

Mr. Sutherland. Because they probably have a trap or two in one of the streams.

Mr. Raker. Would the taking out of the trap, so the fish could be properly cared for, really seriously diminish the proper business that ought to be done there in fisheries?

Mr. Sutherland. Certainly not. It does not destroy their right to fish. They still exercise the right of fishing with the same gear that the neighborhood uses. They are not affected in any way except that this exclusive privilege is denied them and they are placed on the same basis as the other canneries.”

On Page 5971, during the same debate on April 9th, 1924, the discussion was as follows:

Mr. Moore of Virginia. Is it not frank to say that except for opposition of the great canners and packers there would have been legislation long ago for the purpose of conserving the fisheries of Alaska?

Mr. Briggs. Well, I am disposed to believe that. The canners have come before the Committee time after time, except a few who have a pack of about 100,000 cases, and advocated a bill for the regulation of the conservation of these fisheries; but they also consistently advocated the use of traps and claimed a possessory right in the trap fishing in Alaska. They claim no title against the Government. They say they do not insist they have a title, and admit that they are only exercising a privilege; but they assert the courts have declared such privilege is good as against anybody else except the Government.

Mr. Moore of Virginia. In other words, they blow hot and cold, and the result is that we have had no effective legislation?

Mr. Briggs. The result may be you will be without any legislation as long as this question is one of such a highly controversial character as it is, and attempts to suppress it in this bill may perhaps jeopardize every bit of regulation for the conservation of Alaskan fisheries.

Mr. O'Connell of Rhode Island. Will the gentleman permit one question?

Mr. Briggs. I will yield to the gentleman on the committee.

Mr. O'Connell of Rhode Island. Is it not true in this same connection that this particular bill recognizes the right of free fisheries, which is claimed by a great many has been abrogated under the law as it is now as the present time?

Mr. Briggs. Why, undoubtedly. I want to read this to the Members of the Committee. This bill provides the Department of Commerce has power in the conservation measures employed by that Department to prohibit fishing in any zone where it is felt necessary to do so, to regulate the kind of fishing device, traps, gill nets, seines, or anything else. Not only that, but it provides that wherever it allows limited fishing in certain areas that that fishing shall be open to everybody, and that nobody shall have any preference or any preferred rights therein. This bill says:

Provided, That every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and

that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior".

Again on Page 5973, during the same debate:

"Mr. Hadley. . . . What the bill does is to provide that every citizen, operating whatever class of gear he may or will, is invited into the fishing areas where fishing is permitted by the Secretary of Commerce.

Mr. Sutherland. Will the gentleman yield?

Mr. Hadley. Yes.

Mr. Sutherland. Does the gentleman contend that any citizen can fish with a trap?

Mr. Hadley. I am making a general statement.

Mr. Sutherland. That statement is very general.

Mr. Hadley. Any citizen who has the facilities and has the capital may do so, but the citizen who operates a seine must also have a considerable investment to do that."

The discussion quoted above is extremely pertinent. It is shown there in so many words, that it was the purpose of this bill to make fishing by trap available to any American who had the capital, the foresight and the energy to build a trap and fish it in common with all others who had the similar pre-requisites, subject to the restriction that "every such Regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies . . . ", as to "time, means, methods and extent of fishing . . . ", as may be prescribed. In other words, whoever wishes to fish may fish wherever he wishes, subject, of course, to the usual proviso that it will not be near the mouths of streams, spawning beds, etc., and that he shall only be subject to the same, and only the same, general limitations as any other fisherman or operator in the same general area.

The discussion in the Senate was in many ways even more enlightening, and the Congressional Record for May 26, 1924, on Page 5920, shows as follows:

"Mr. Dill. Mr. President, I should like to ask my colleague a question. As I understand, the situation in Alaska has been very unsatisfactory as it has been handled up to this time, and those who object to the conditions which have prevailed there charge them largely to the Secretary of Commerce, claiming that he has not treated them fairly. As I understand, the bill gives the Secretary of Commerce practically absolute power.

Mr. Robinson. May I interrupt the Senator?

Mr. Dill. I yield.

Mr. Robinson. The Secretary of Commerce sought to give exclusive right to fish in certain Alaskan water, and out of his attempt to give exclusive rights to fish, thus depriving a large number of people the right to pursue their usual vocation, great complaint arose. *This bill, however, denies to the Secretary of Commerce any power to grant an exclusive right to fish and requires him to give everyone equal rights within the areas where fishing is permitted.* (Italics ours)

Mr. Dill. That is what I wanted to have made clear—as to whether this is an enlargement of his power or whether it is a limitation of his power.

Mr. Jones of Washington. The bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce, just as the Senator from Arkansas has stated. Within the two reservations (Counsel's Note—privileged areas) that were created by Executive order a year or two ago the Secretary of Commerce has seen fit to make regulations under which outsiders might not go in order to fish. *In other words, those who are already located there, if he thought they took all the fish that should be taken, were given the full rights, and nobody else could go in there and take fish.*

Mr. King. They were given exclusive rights."

For the reason set forth above, the good intentions of the Secretary of Commerce in refusing fishing permits to others besides the preferred few, were not only questioned

but denounced on May 28, 1924, on Page 9683, during the following debate to the Senate:

“Mr. Fess. But does not the Senator agree with me that the purpose of the administration, so far as the fisheries in Alaska are concerned, is to conserve the fish, and if there is any privilege denied, it is in order to prevent the decrease of the salmon supply?

Mr. King. No, I do not agree with the Senator.

Mr. Fess. That is my impression.

Mr. King. I think, Mr. President, that Mr. Hoover's policy has fostered monopolies and has been disadvantageous to the best interests of the people. In my opinion, the Executive order creating these reservations was illegal, and the granting of exclusive privileges to fish within these reservations was not only unfair and unjust, but was likewise illegal. *It permitted the growth of monopolies and was a discrimination against those denied fishing permits.* Protests were made by the Legislature of Alaska as well as by the residents of that Territory, and the policy of Mr. Hoover was denounced as a violation of the rights of American citizens of that Territory and calculated to promote the interests of the large canning corporations which, if not individually, at least collectively, constitute a monopoly * * * ”. (Italics ours)

And on Page 9684:

“ * * * The fact is that these fishing reservations in Alaska are reservations of the packing companies. The facts warrant the conclusion that the reservations were created for and by the packers, and that the regulations were drawn for and by the packers.”

More proof as to the intention of the Congress than that set forth above could hardly be required. The report of the Committee in the House clearly sums the matter up. The report is a short one, No. 357, delivered to the House on March 21, 1924, and made by Mr. White of Maine, the greater part of which reads as follows:

“ * * * At the present time, it is the policy of the Department as one means of control of fishing to grant

a limited number of fishing permits within any designated area and to exclude all others from fishing rights therein. Your Committee does not question the purpose of the Department in this regard, but it has reached the unanimous and positive opinion that this practice of granting exclusive fishing privileges should cease, and in this section it is declared that all regulations authorized to be made shall be of general application and that no exclusive or general right of fisheries shall be granted, nor shall any citizen be denied the right to take fish in waters where fishing is permitted. This declaration of policy and prohibition of law was earnestly urged upon the Committee by the Delegate from the Territory, Mr. Sutherland, and has the general support of the people of the Territory."

The bill became the law on June 6th of that year.

In the fishing seasons of 1925 and 1926, the Act of 1924 functioned perfectly and there were no complaints. During these years the pack of fish increased in Alaska and the ends of conservation were thereby served, indicating that the bill had eminently accomplished its purpose. During these years and for many years prior thereto, with the exception of the two years in which the Secretary of Commerce had granted exclusive fishing rights as set forth above, the Fishing Regulations for the Alaska District, as published each year in either January or February, stated that, generally speaking, *all the waters of Alaska were opened to fishing* (by traps) except certain specified areas such as the mouths of streams and a given distance on each side of the mouths of such streams, all spawning beds and similar areas. In the year 1927, the Secretary of Commerce, through Commissioner O'Malley of the Bureau of Fisheries, issued the Regulations for that year based upon the premises that *all Alaska was closed to fishing* (by traps) except certain specified spots designated by degrees, minutes and seconds of latitude and longitude and within 500 feet of such geographical point. There was at that time a further regulation in effect which forbid one trap from being within 1000 feet of another. Since that time,

the Prohibition has been extended so that no trap may be within a mile of another and the Regulations coincidentally enlarged the area to each side of the designated point for each site to within 2500 feet of that point, thus still permitting only one trap to a site.

This changed the whole meaning and intent of the Act. While before there were open areas into which any fisherman might go and erect his trap, assuming, of course, that it did not conflict with the usual conservation limits referred to above, he was now required to secure the approval of the Bureau of Fisheries for every specific site where he wished to erect a trap and if this were denied him, he was simply unable to fish. Without open areas into which he might go, he was thereby restricted to any spot which the Bureau might be willing to grant him. No substitute or other place where he might build a trap were offered to the unsuccessful fisherman-applicant in lieu of the one denied him. This would not be satisfactory from a practical point of view if such a substitute had been offered, as fish trap sites must be prospected for as gold is prospected for, and there is no assurance that the site requested would "prove out", as the fishermen say, even if a trap were built. For that reason some sites are abandoned after the first year as useless, whereas others turn out to be very valuable.

The complaint which arose at this time was not very great as the Bureau was at first quite liberal in granting such sites as were requested, but as time went on, it became increasingly difficult to secure a site by merely applying for it until, during the last two years, no new sites of any kind have been opened.

It is not logical to say that the few small sites which were closed recently were done for the purpose of conservation when practically no fish were caught therein, or at least a very negligible number. Any one of the more successful traps reported catches of more than ten times the amount of all the fish caught on the twenty sites which were closed

during the prior year and yet none of these traps, all owned by one of the four large fishing concerns, were in any way disturbed. *It is more than a coincidence that the four large corporations which exist today are actually the four corporations which held the monopoly to which Congress so strenuously objected in 1924 at the time the Act was passed and which it was the avowed purpose of the Act to discontinue.*

It is the position of the Department that anyone may fish, insofar as the Department is concerned, in any of the extremely limited areas open for fishing and which, as pointed out above, can only contain one trap in each area. This explanation might be plausible if any citizen could walk into a trap site which had been opened at the request of someone else and simply start building his own trap (they have to be taken down each year because of ice conditions) and take the location himself for the balance of that year. As the Department well knows, a War Department permit is required for this purpose and where one such permit has already been granted to one party, a similar permit will not be granted to another. As a consequence, no one citizen may usurp a site of another citizen who has the necessary permit even though the party who has the permit fails to build a trap or operate on the premises. Of the twenty sites closed recently by the Department, a number of them were such abandoned sites.

No objection would be raised to the Department's present conduct of regulating the fishing industry if every citizen who wanted to build a trap was given the privilege of doing so, subject to his own limits of finance, experience and ability as made clear in the Senate debate, and as pointed out above, none were raised during the first few years after the Regulations were "inverted" in 1927, but great objections have been made since the Regulations commenced tightening up on the trap sites, and in the past two years, shut them off altogether.

Under the present method of control, the Secretary of the Interior in effect says who can and who cannot fish as a means of control, much the same as existed in 1924, which circumstances gave rise to the Act of Congress now in question, and the provisions in the rules and regulations as published which actually operate to conserve and control the fish take of all the traps are those which provide for increasing or decreasing the weekly closed period from 24 to 36 or 48 hours or vice versa, and in that fashion the proper escapement is insured. Such a regulation is an enforceable one and does not impair or restrict the efficiency of the gear itself, while at the same time serves all the ends of conservation.

The restrictions governing the use of mobile gear (boats and nets) might well be applied to stationary gear (traps), making the necessary allowances for their individual characteristics. There is no limit to the number of boats which may fish in any given area in Alaska, which gives every boatowner and net fisherman an equal opportunity as required under the law (1939). This is done in the Bristol Bay area to an excellent extent, and points the way to similar control of trap fishing. In Bristol Bay the weekly and mid-weekly closing periods are predicated upon the operation of a certain number of boats in the area. If more be used than the maximum number set by the Bureau, a certain number of minutes are added to each closed period for each additional boat used. This method of control is of general application, denying to no citizen the right of fishery, and gives everybody an equal opportunity. If traps instead of boats are used, a similar arrangement could be worked out without necessarily restricting the size and design of traps in such manner as would make them inefficient and uneconomical to operate.

With these methods to effectively control the take or escapement of salmon available, the Department of the Interior, acting through the Bureau of Fisheries, should be more than glad to be relieved of the responsibility of decid-

ing who and who not shall fish by trap in Alaskan waters, as is the practice at present. As the situation stands now, the monopolistic practices of 1924 are again in effect and strangest of all, actually supported by the Secretary of the Interior to the detriment and ruination of all the smaller fishermen and operators. The present delegate from Alaska, Anthony J. Dimond, stands in precisely the same position on the situation as it exists today, as Delegate Sutherland did in 1924.

CONCLUSION.

The Appellant wishes to make it clear that what he seeks is that the Appellees be restrained from carrying into effect the invalid regulations herein complained of, and that the Court declare such rules and regulations null and void.

Respectfully submitted,

WILBUR E. DOW, JR.,

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APPENDIX

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM 1941.

No. 7911.

WILBUR E. DOW, *Appellant*.

v.

HAROLD L. ICKES, Secretary of the Interior, and
HENRY L. STIMSON, Secretary of War, *Appellees*.

APPENDIX TO APPELLANT'S BRIEF.

I.

Pleadings and Other Papers Designated by the Appellant.

Appellant's Re Amended Complaint, Filed February 19, 1941—Civil Action No. 6859.

90 I. The plaintiff, Wilbur E. Dow, a citizen and resident of the United States, and of the State of Washington, sues the defendants, Harold L. Ickes, as Secretary of the Interior of the United States, a citizen of the United States residing in the District of Columbia, and Henry L. Stimson, as Secretary of War of the United States, a citizen of the United States residing in the District of Columbia, for this:

2. That on or about the 29th day of November 1939, Wilbur E. Dow, hereinafter called the plaintiff, applied to the Bureau of Fisheries of the Department of the Interior for the allocation by that Bureau of two sites wherein he might erect lawful structures, called traps, for the capture of salmon in the waters of Western Alaska.

The Sites requested were as follows:

ALASKA PENINSULA AREA

Mainland Coast

Mainland Coast (I) within 2,500 feet of a point at 55 degrees 36 minutes 20 seconds north, latitude, 159 degrees 36 minutes 40 seconds west longitude;
 91 and (2) within 2,500 feet, of a point at 55 degrees 40 minutes 5 seconds north latitude, 159 degrees 32 minutes 11 seconds west longitude.

3. That shortly after making the application as described above, the plaintiff wrote the Secretary of Interior and asked that the application for the two sites as described above be altered approximately a mile and one half north, in the case of the first location, and a half mile north in the case of the second location, in order to secure better driving ground for the projected traps.

That the amended complaint as described above made the requested sites as follows:

Mainland Coast

Mainland coast (1) within 2,500 feet of a point at 55 degrees 38 minutes north latitude, 159 degrees 36 minutes 40 seconds west longitude and (2) within 2,500 feet within a point at 55 degrees 40 minutes 30 seconds north latitude, 159 degrees 32 minutes 15 seconds west longitude.

4. That prior to the 29th day of November 1939, the plaintiff had duly applied for and received his territorial licenses from the Treasurer of the Territory of Alaska and duly made application to the War Department for permits for the construction of such traps on the two sites as described

above, and as provided for in the rules and regulations of the War Department.

5. That on January 6th, 1940, the defendant herein, Harold L. Ickes, Secretary of the Interior, announced the issuance of the Alaska Fishing Regulations of the Bureau of Fisheries of the Department of the Interior for the season of 1940, in which the sites requested to be opened by the plaintiff were not included, thus denying plaintiff's application.

92 6. That the defendant herein, Harold L. Ickes, as Secretary of the Interior, in denying plaintiff's application, acted arbitrarily, irregularly and capriciously in that he failed to heed the express provisions of the Act of Congress of June 6th, 1924, Section I, as amended June 18, 1926, Title 48, U. S. C. A. Section 222, entitled "An Act For the Protection of the Fisheries of Alaska, and for Other Purposes", whereby every regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to fish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior.

7. That sites for the erection of traps are never included in the Regulations of the Bureau of Fisheries of the Department of the Interior except at the specific request of some person or corporation, there being no general open area for the erection of fish traps in any area of Alaska.

8. That numerous other trap sites, all held by parties other than the plaintiff, were permitted to remain open in the same waters of Western Alaska for the year 1940, but that plaintiff's application was denied.

9. That on January 31st, 1941, the following press release was issued by the defendant, Harold L. Ickes, as Secretary of the Interior:

PRESS RELEASE

Secretary of War Stimson announced today that, acting upon a request from the Honorable Harold L. Ickes, Secretary of the Interior, and in the interest of the Alaskan salmon fishing industry, particularly during the present emergency, the War Department would continue for another year its former method of regulating the construction of fish traps in navigable waters of Alaska begun in 1935 as a result of an agreement entered into between the two departments. Mr. Stimson stated that this further extension of one year is for the purpose of enabling the Department of Interior to secure better legislation for the administration of the salmon fishing industry.

January 31, 1941."

10. That the defendant herein, Henry L. Stimson, as Secretary of War, under agreement with the defendant herein, Harold L. Ickes, as Secretary of the Interior, issues only one War Department permit to erect a trap on any given site as described in the Bureau of Fisheries Regulations and published in the Federal Register.

11. That there is nothing in the War Department Regulations which compels the defendant, Henry L. Stimson, as Secretary of War, so to act but that same is done solely upon his own responsibility under agreement with the Secretary of the Interior as aforesaid.

12. That the plaintiff herein, Wilbur E. Dow, has duly applied for War Department permits from the defendant, Henry L. Stimson, as Secretary of War, through his representative, Major General Julian L. Schley, Chief of Engineers, for the erection of fish traps on the sites hereinabove referred to, but that the same have been denied.

13. That the War Department, through Henry L. Stimson, the defendant herein, does not grant more than one permit for the erection of a fish trap on each site as set forth in the Bureau of Fisheries Regulations and as published in the Federal Register for the respective year.

14. That by reason of the allegations above set forth, the defendant herein, Henry L. Stimson, as Secretary of War,

issues fish trap permits which are sold and leased as interests in property, directly contrary to the statement
 94 on the face thereof that such permits are not to be deemed an interest in property.

15. That instructions to applicants for permits for fish traps in Alaska, as issued by the Secretary of War, state amongst other things, as follows:

“After receipt of the regulations, permits for such locations as conform thereto, and to the requirements herein made, will be issued, provided that, where issuance of permits on two or more accepted applications would result in conflict with the regulations of the Bureau of Fisheries, regarding distance between traps, one permit only will be issued by this office, and that on the application first received.”

16. That as a result of the allegations above set forth the applicant who first applies to the Bureau of Fisheries for a trap site, applying at the same time, or shortly thereafter, to the War Department for a permit to build a trap on the identical site requested of the Bureau of Fisheries, obtains a priority from the War Department, which is good for the life of the permit, namely three years, renewable at the end of that time, and which he can and frequently does, sell or lease to others.

17. That as a result of the allegations set forth in Paragraph Sixteen above, the successful applicant for a trap site is given an assignable right in a natural resource contrary to the terms of the statute above set forth.

18. That beginning with the year 1927, the Bureau of Fisheries of the Department of the Interior has closed all general open areas, in the waters of the Territory of Alaska, to fishing by trap and has, since that date, required that a specific request be made by a firm or individual for a specific site, exactly located to degrees, minutes and seconds of latitudes and longitude, after which the Department in the regulations for the ensuing year, announced whether or not that specific site requested would be open to

95 fishing for the forthcoming season covered by the regulations.

19. That the decision of the Secretary of the Interior, through the Bureau of Fisheries as to open areas for fishing by trap, designated by latitude and longitude, or within 2500 feet of the intersection of such two lines, is not based upon any scientific or independent investigation by the Department of the Interior or the Bureau of Fisheries in respect to the particular location open for fishing, but depends entirely upon the arbitrary, irregular and discriminatory selection by the defendant, its agents, servants and employees, based upon the application submitted by the applicant at the request of the Department as set forth in Paragraph "18" hereof, and that the defendant has not used any other standard in determining what areas shall be open to trap fishing.

20. That as all the necessary piling and other equipment, which takes months to accumulate, for each trap is available at, or near the site used the previous year, those who presently have the use of a site have a very distinct advantage over anyone wishing to preempt such site, as it would take months of preparation to get the material in, and the present user would have had his trap commenced and eventually finished before the party desiring to preempt such site could get started or complete his own trap, and that as a matter of custom, trap operators respect the sites of each other and do not practice "claim-jumping" which would only serve to create a chaotic condition in the industry.

21. That as a consequence of the conditions set forth in Paragraph "20" hereof, as a practical matter, the plaintiff
 96 was unable to take advantage of any of the sites already opened by the Department of the Interior, thus denying him any opportunity to exercise his statutory right to trap fishing in the waters of the Territory of Alaska.

22. With the exception of three that are privately owned, all fish traps on the Aleutian Peninsula and in the Western part of Alaska are owned by three large corporations. These

three privately owned traps are under contract for a long period of years to sell their catches to the three companies as aforesaid.

23. That in Southeastern Alaska, which constitutes the only other area of Alaska either open or suitable for trap fishing, 60% of the traps are owned by five large companies and 80% of all the traps are owned and controlled by ten companies, and that the individuals owning the remaining traps in this area contract their harvest to some of the larger companies above referred to.

24. That by refusing to open individual sites for individuals, as has been done in the past, Harold L. Ickes, as Secretary of the Interior, through the Bureau of Fisheries, and Henry L. Stimson, as Secretary of War, through the Chief of Engineers, is maintaining the status quo in the number of sites where fishing by trap is permitted in the waters of Alaska.

25. That the practice above referred operates for the direct benefit of the few large companies operating the available trap sites in Western Alaska to the exclusion of the plaintiff and all other individuals who may wish to share in the industry.

26. That by reason of the allegations set forth herein, the plaintiff herein has been denied the right of fishery set forth in the statute above referred to.

97 26. That by reason of the allegations set forth herein, a monopoly has been set up and maintained by both defendants herein directly contrary to the statute above referred to, and in particular to that section thereof which reads as follows:

“Provided, that every such regulation made by the Secretary of Commerce (Interior) shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, . . . fish or shall fish in any areas of the waters of Alaska where fishing is permitted by the Secretary of Commerce (Interior)”.

27. That the allegations set forth herein, constitute a violation of the Sherman Anti-Trust Act, 26 Stat. 209 Ch. 647, by both of the defendants herein.

28. That plaintiff has no other adequate legal remedy.

29. That all and singular the premises are true and within the jurisdiction of the United States and this Honorable Court.

Wherefore, the plaintiff prays judgment that the defendant herein, Harold L. Ickes, as Secretary of the Interior, be enjoined and restrained from carrying into affect the regulations herein complained of, and that he be ordered forthwith to issue supplemental regulations embodying the two sites above referred to, described in paragraph three hereof, opening such sites for the capture of salmon by lawful structures called traps, or that sufficient coast-line be opened for the voluntary erection of fish traps from which the plaintiff might select a site, or for such other and further relief as might enable him to share in the industry in common with others now operating therein, or that this defendant be ordered to return regulations similar to those in use prior to the year 1927, and which type of regula-

tions in use at the time the statute referred to herein
98 was enacted, in such fashion that all the waters of Alaska, except mouths of streams, spawning beds, etc., be again opened to fishing by trap within such limits prescribed in the Act as to time, means, method and extent, as to the Secretary may seem advisable; and that the defendant herein, Henry L. Stimson, as Secretary of War, be restrained, enjoined and ordered to cease and desist from his present practice of issuing only one permit to a trap site and for such other and further relief as the court may deem just and proper.

Dated, New York, N. Y., February 17th, 1941.

* * * * *

41 *Affidavits in Support of Appellant's Amended
Complaint.*

STATE OF WASHINGTON,
County of King, ss:

Wilbur E. Dow, Sr., being duly sworn, deposes and says:

That his home address is #621 West Galer Street, Seattle, Washington. That he has been connected with the salmon fishing industry, directly and indirectly, in Alaska waters for the past 26 years and is presently engaged in efforts to go into the salmon industry for his own personal account.

That he is familiar with the manner in which trap sites have been granted by the Department of the Interior, Bureau of Fisheries for the past 26 years and more particular, the effect of the controlling statute known as the White Act and the subsequent effect about the year 1927, of the complete revision of the Fishing Regulations made by the Bureau of Fisheries whereby all areas in Alaska were closed to fishing except the specified areas where single traps were permitted by the Bureau as against the prior policy in use at the time the Act was passed whereby all areas in Alaska were open to fishing by trap except certain prohibited areas near the mouths of streams, closed bays and spawning beds.

That prior to the promulgation of the fisheries regulations for the year 1927 your deponent knows and the records of the U. S. Fish and Wild Life Service (formerly Bureau of Fisheries) and the records of the U. S. Army District Engineers' office of Juneau, Alaska and Seattle, Washington, will disclose that any citizen without exception, whether engaged in the salmon industry or about to engage in the industry could secure fish trap sites by the simple method of writing a letter of application to the local U. S. Army District Engineer describing the exact location desired, by attaching blue prints showing the coast line of the vicinity of the trap site, depth of water, geographical location by latitude and
42 longitude and place of trap. That if in the opinion of the local U. S. Army District Engineer that the proposed fish trap would not constitute a menace to navi-

gation a permit to erect and/or locate a fish trap was forthwith issued by that office.

These traps were located in all districts of Alaska except in the Bering Sea area. Many locators of fish traps acted prudently while others did not and used the rule of the thumb, but the prudent locators would prospect the proposed fish trap site, ascertain just how the fish passed or would enter the proposed site and in what quantities, having a careful survey made by a recognized engineer and surveyor in order to obtain the exact geographical location of the site by latitude and longitude.

The locator and operator of the fish trap site would then thereafter write or verbally inform the Commissioner of the Bureau of Fisheries, giving the exact location and a description of the trap he intended to put in, which application was acknowledged by the Commissioner by letter or verbally acknowledged to the applicant by the Commissioner, and thereafter permission would be automatically granted by the Department. A War Department permit, as well as an Alaska fishing permit would also have been secured and there would be nothing further to be done.

That after the passage of the White Act in 1924, and up to and including the season of 1926, the same procedure was followed, but after 1927, the Regulations were turned upside-down in such fashion that instead of all the waters in Alaska except certain specified spots, being open for fishing by trap, the entire territorial waters of Alaska were closed to trap fishing except the specific areas where single traps could be erected and those locations were set forth in the regulations issued annually and by supplements and designating by latitude and longitude. That your deponent had no complaint on this score nor did others in the industry until about two years ago, the Department declined to open any more sites for fishing but froze the Regulations as they then stood, and in this fashion, your deponent and many others in a similar position were unable to take part in the industry.

That it is sheer nonsense and a gross premeditated misstatement of facts for the Department to claim that it merely opens areas to fishing by trap and does not care who fishes there. For upwards of thirteen years last past there has been a peculiar partiality in the opening of trap sites as certain people were able to get them and certain others were not. In the summer of 1938 and in the fall of same year, in the fall of 1939, and in the fall of the present year 1940, the applicant applied in the usual manner to the Bureau of Fisheries for the opening of fishing areas for trap fishing, and during this period of three years last past he made six round trips from Seattle to Washington, D. C. and interviewed the Bureau of Fisheries and the U. S. Army Engineers Department, but without success. The Bureau of Fisheries acknowledged each application made and likewise stated verbally that the application would receive consideration but however, the fisheries regulations for the years 1938, 1939 and 1940 made no provision for open trap fishing areas as deponent applied for. But however, the regulations did during these years provide for approximately 15 open area fish sites (other sites other than which deponent applied for) as applied for by the various applicants. In other words, the Bureau of Fisheries acted highly discriminatorily contrary to public policy and created special privilege with utter disregard of the letter and the spirit of the law under which they are specifically charged with the responsibility of administering.

That as a practical matter, trap fishermen in Alaska did not wish to preempt or jump the fishing sites that
 44 others had prospected and used, and surely the Department does not wish to precipitate what would amount to a war in the industry. As a further practical matter, traps cost from five to twenty-five thousand dollars to build and consist of a large number of long pilings which have to be freighted up from Seattle together with a large quantity of wire netting and other materials. It takes months to assemble this material and take it to the point where it is to be used, but as people who have operated on a

site at least one year have the pilings and sometimes a pile driver reasonably handy to the site, piles being pulled up and stored away each winter, it would be impossible to beat such an operator to his own site even if you so wished to do, as he would be many weeks, or even months, ahead of any preemptor by the time he started North.

In view of the circumstances as herein set forth the effect and the result is and has been that many who desired to participate in the Alaska salmon fishing industry are shut out and/or debarred from engaging in the industry by the very manner in which this important industry is regulated by the Bureau of Fisheries of the Department of the Interior. In circumstance, the net result is that a few large corporations have a stranglehold and maintain a complete monopoly within and over the entire industry with direct cooperation, assistance and acquiescence of the department of Interior in its administration, and is a gross unjust interpretation of the White Act, which was designed to prevent just such a result.

WILBUR E. DOW, SR.

Subscribed and Sworn to before me this 5th day of November, 1940.

E. E. STEINER,
*Notary Public in and for the State
of Washington, residing at Seattle*

45 STATE OF WASHINGTON,
 County of King, ss.

John N. Gilbert, being first duly sworn, deposes and says: That his address is 2011 Crescent Drive, Seattle, State of Washington; that he has been connected with the operating end of the salmon industry since 1911, a period of 30 years, and that since 1924 and up to until the spring of 1939, he acted as the executive vice president of the three largest salmon packing companies in the industry. In that capacity, and with these large companies namely,

Alaska Consolidated Canneries, Inc., 1924-1928 inclusive; The Alaska Pacific Salmon Company, 1929-1937; and the Pacific American Fisheries, Inc., 1937 to 1939, his work included either the direct supervision or the cooperation in the making of sales policy and the conduct and the carrying out of such policies by visiting and calling on the trade of all of the markets of the United States. Since that time he has been in the salmon packing industry on his own account, being the sole owner and proprietor of that company known as the Orca Packing Company.

That during the many years in which deponent has been active in the industry, and in particular with respect to the sales end of the business, he has noted in innumerable instances during a great many different years, certain firms have depressed the selling price of canned salmon when there seemed to be no logical or economic reason for so doing, and when at the same time most every other factor in the industry wanted it maintained; in fact, most of them were unable in their operations to produce at prices and meet such cut-throat competition. These price cuts have in many cases resulted in the bankruptcy and closing down of certain companies. In support of this statement the deponent wishes to give a concrete specific instance, which will illustrate and serve as
46 an example:

During August of the present year 1940, with the strongest canned salmon market condition in the history of the industry, with a much smaller than average production, and with no stocks on hand, with a generally improved economy in the United States, with the prospects of millions of men going into service who would require canned salmon, it being an excellent war food; with the fact that England is calling on this country for unusually large supplies of salmon, the P. E. Harris Company and the Kelley-Clarke Company, a brokerage firm who acted specifically on behalf and on account of the San Juan Fishing & Packing Company, cut the price of Pink

salmon from \$1.45 per dozen to \$1.35 per dozen. (While there are five species of salmon, the grade "Pink" is used in this example as this specie constitutes by far the largest proportion of the total production of all canned salmon.) Salmon was moving freely; there was a good demand. When the price was reduced from \$1.45 per dozen to \$1.35 per dozen on Pink salmon by the above named firms some time before the middle of August, the actual production, not over 50% this specie, had been packed by the industry for this current season. Under the circumstances and at that time and as events developed, there was no occasion for a price reduction at all. However, a great many packers, and particularly the smaller packers—deponent among them—had already sold or contracted to sell either a large part or all of their production of Pink salmon, which constituted nearly their entire production as it so happens, at the price of \$1.45, which was guaranteed against decline by representative factors in the industry.

Naturally as P. E. Harris & Company and the Kelley-Clark Company were representative factors in the marketing end of the business, and they having declined the
47 price, the smaller packers including the deponent, were obliged to rebate to the lower price thereby losing 40c per case on sales already made, and naturally obliged to sell the balance of their pack at that lower figure in order to meet their financial obligations. The results of this whole price maneuver were that these smaller packers and the deponent lost a total sum of money aggregating between one and two million dollars. In the case of the deponent, it cost him no less than \$25,000.00.

Supporting deponent's recitation of facts as herein set forth is attached hereto copies of P. E. Harris & Company letters of July 29 and August 1, 1940, addressed air-mail to their brokers and field representatives. To quote from their letter of July 29, 1940, the fourth paragraph of said letter reads as follows: "The figures on Reds speak for themselves and we again emphasize that since the "Pink"

and "Chum" packs will not be known until August 25 to 28th, (deponent's underscoring) these two items mean nothing now." Further, to quote from their letter of August 1, 1940, paragraph two, second sentence, "the run all over Southeastern Alaska continues to be very light. This means what we have mentioned in two previous bulletins—that the "Pink" and "Chum" packs cannot be accurately estimated and will not be known until August 25 to 28." (Deponent's underscoring.) The above statements speak for themselves, and from the quoted it must be obvious that to have made an opening price on either Pink salmon or Chum salmon prior to the middle of August with a large part of the pack still unprocessed, and from their own statements that the run in Southwestern Alaska continued very light in August, and this by the way being one of the largest producing areas, there must have been more than just a marketing reason for having dropped the price when they did so.

48 In order to further prove that there was no reason for this reduction, it can be stated that the price of Pink salmon has already gone back to an asking price of \$1.45, and with stocks so greatly reduced; with all small packers out of stocks, and what is left in the hands of but a few large factors, it is impossible for the trade to secure canned salmon today at \$1.45.

The reason for setting forth this exact situation concerning this cut-throat price reduction by certain factors is to preface the following statement to the effect as to the reasons for the reduction and how these factors were able to accomplish it. The first immediate reason is that these factors by reducing the price, then later step into the market; could and later did buy large blocks of canned Pink salmon stocks, and then make a speculative profit as soon as the market reacted upward, which it was certain to do in view of the fine statistical position of the industry (low stocks), and the upward trend in the general economy of the country, that is, the increased buying of the public.

The second consideration in connection with such a price reduction, and by the particular factors herein named is this: that the Kelley-Clarke Company, who admittedly acted in this instance on behalf of the San Juan Fishing & Packing Co., and the P. E. Harris Company, who acted on their own account, are large operators of fishing traps as a means of catching salmon, and is a source of supply for their canneries in Alaska; that each of these companies pack upward of 95% of their product from such traps, and by so doing are able to secure a lower fish cost than is possible by some operators who purchase the bulk of their product from mobile gear such as seiners, gill netters, etc.

That in the areas in which San Juan Fishing & Packing Company and the P. E. Harris Company operate fish
49 traps certain individuals including the deponent, have made requests of the Government for trap sites, and such applications have been denied. It is also true in the knowledge of the deponent that many other individuals and firms have made application to the U. S. Department of Fisheries for the opening of shore line areas for the operation of fish traps, and that these also were denied. No criticism would be made of the efficient operation of the price cutting factors herein mentioned were it not for the fact that the U. S. Bureau of Fisheries in protecting them as against other individuals and firms, the deponent included, who made application for sites in the same districts and been denied, has in practical effect created a situation which enables these factors to produce for less, while others must rely upon mobile gear and operate at very much greater fish cost for their raw product.

Such other elements as volume and continuity of this trap fish supply are also very great factors in reducing other items of cost that contribute to the producing of canned salmon, and make greater savings in addition to just the differential in the cost of fish harvested in traps, as against fish harvested by other classes of gear, as herein named.

That this unfair competition, created by the Bureau of Fisheries through its allowing certain Packers to operate fish traps and deny others the same right, in the same vicinity, under the same practical working condition, and contrary to the word and spirit of the White Act, passed by the Congress in June, 1924, if not rectified and the abuses as herein set forth allowed by the Government to continue, will lead to a more serious situation, and to a concentration of control of the industry in the hands of a very few firms or individuals, and will contribute to the further losses and ultimate bankruptcy of all small operators, thus generally demoralizing the industry.

JOHN N. GILBERT

Subscribed and Sworn to before me this 15th day of November, 1940.

VIOLA S. PAGE

(Seal)

*Notary Public in and for the State
of Washington, residing at Seattle.*

51

P. E. Harris & Co.
Canned Salmon
Seattle

Cable Address
Hawkfish
all codes

(Trade Mark)

July 29, 1940.

To Our Brokers:

Following are the pack figures for the week ended Saturday, July 20th, compared with corresponding figures for the two previous seasons:

Date	Kings	Reds	Cohoes	Pinks	Chums	Total
7/20/40	20,306	759,766	53,186	335,188	348,859	1,517,305
7/22/39	27,661	1,616,453	9,311	312,989	230,451	2,196,865
7/23/38	39,680	2,191,254	48,492	306,035	329,565	2,915,026

Figures from all districts were not available until this morning. We purposely delayed our weekly air mail bulletin until we could give you the exact figures and want to point out to you and your buyers that reports issued by

others on Thursday and Friday of last week did not include two important districts.

The figures on Reds speak for themselves and we again emphasize that since the Pink and Chum packs will not be known until August 25th to 28th, figures on these two items mean nothing now.

Our brokers in Red markets were advised by wire last week that we were forced to withdraw on Tall Reds. We will still accept a limited amount of business on Halves at \$1.65 and Flats at \$2.60.

Other items remain subject to our final confirmation on the basis of our bulletin of the 18th and of course are subject to final confirmation and immediate withdrawal.

New pack stocks are just beginning to "dribble" into Seattle and we are making every effort to ship orders now on our books. We realize that many of you are extremely anxious for first shipments to go forward and we are doing everything possible to expedite them. We do not, however, expect to ship in volume until after the middle of this month.

Subject to final confirmation, we quote as follows for prompt shipment:

	Talls	Flats	Halves
Seakist 12/1s		\$2.85	
Alaska Red Sockeyes	Withdrawn	2.60	\$1.65
Puget Sound Sockeyes		3.50	2.10
Fancy Cohoes	\$2.00		1.25
Medium Reds	1.90		1.20
Alaska Pinks	1.45		1.00
Alaska Chums	1.35		.90

Prices on unsold floor stocks guaranteed against our 1940 opening and for 30 days after arrival.

Yours very truly,

P. E. HARRIS & CO.

E. O. PAUP

Manager Sales Dept.

EOP:EM

Airmail

52	P. E. Harris & Co.	Cable Address
	Canned Salmon	Hawkfish
(Trade Mark)	Seattle	All Codes

August 1, 1940.

To Our Brokers:

We list below the pack figures for the week ended Saturday, July 27th, with comparisons for the corresponding weeks of the two previous seasons:

Date	Kings	Reds	Cohoes	Pinks	Chums	Total
7/27/40	21,924	837,905	78,298	778,950	471,070	2,188,147
7/29/39	29,420	1,778,102	23,382	668,765	306,958	2,806,627
7/30/38	41,620	2,324,963	79,393	725,010	414,992	3,585,978

Several Pink districts which were operating at capacity the past week have shown decreases this week, the results of which will not appear until the figures are available for the week ending Saturday, August 3d. *The run all over Southeastern Alaska continues to be very light. This again means what we have mentioned in two previous bulletins—that the Pink and Chum packs cannot be accurately estimated and will not be known until August 25th to August 28th.*

We now have advice of several steamer arrivals the first to the middle of next week, which will permit us to begin shipments of Pinks by the end of next week. We already have very limited stocks of Chums and Reds which can be shipped the next few days.

The market on Tall Reds has not yet been determined and we continue withdrawn on that item. Others we offer on the basis of our bulletin of the 29th, subject to our final confirmation.

Yours very truly,

P. E. HARRIS & CO.

E. O. PAUP

Manager Sales Dept.

EOP:EM

Air Mail

53 STATE OF WASHINGTON
 County of King, ss.

John N. Gilbert, being first duly sworn, deposes and says: That his address is 2011 Crescent Drive, Seattle, Washington; that he has been connected with the salmon fishing industry in Alaska waters for the past thirty years, and is engaged in that business at the present time; that he is familiar with the manner in which trap sites have been selected and taken up since first entering the industry thirty years ago. More specifically his experience is as follows: From the years 1924 to 1928 inclusive, he held the position as Vice President and Production Manager for the Alaska Consolidated Canneries, with 7 operating plants and between 40 and 50 traps. That from 1929 to March of 1937, he held the position as Vice President and General Manager of the Alaska Pacific Salmon Company, operating 8 to 10 canneries, and at one time as many as 94 traps; and that from March of 1937, to March 1939, he held the position as Executive Vice President in charge of production, for the Pacific American Fisheries Company, of Bellingham, operating 11 plants and 56 traps. All of these canneries operated under his direction as herein stated, were located in Alaska. During his term of supervision in each case, these companies were each one in turn, the largest operator of traps in the fishing industry. That as the operating head of these companies it was his function to arrange for the securing of permits from the U. S. Engineers, War Department, and to deal with the Bureau of Fisheries for the opening and closing of sites. That in effecting such arrangements it was done only after conference with Bureau officials, generally the Commissioner himself, and very often exchange of considerable correspondence; in any event that while *closures* were not always agreeable to the affiant that *openings* were always made *upon request* and for specific locations.

54 In the light of the above statement it is apparent that he is particularly familiar with the effect of the

controlling statute known as the White Act, which was passed by the Congress in June, 1924. In connection with the White Act he wishes to say that in his opinion it is a wise and necessary piece of legislation, and that *properly administered* it can and will fully serve the ends of conservation by providing for an adequate escapement of fish to the spawning grounds, and will insure an equitable and fair opportunity to all citizens to participate in the Alaska fisheries.

That at all times prior to 1924 and immediately following the passage of the White Act the Department of Commerce (now Interior Department) and for two years thereafter did so word the regulations of the Department that all who wished to participate in the fisheries had an equal opportunity. Thereafter, and beginning with the year 1927, the wording of the regulations was changed so that instead of permitting the construction of traps anywhere except in specific closed areas, it was worded so the traps were permitted *only* in specific areas. No criticism of this would be made except that from that time until now certain applicants for openings have been granted opportunity to fish trap sites, and others have not, and this has all been done on an arbitrary basis without explanation or reason.

That within his own knowledge and experience, having handled the matters personally, trap sites were opened on Popoff Island for the Alaska Pacific Salmon Company, and for Mrs. H. R. Mellick, and on Korovin Island for the Korovin Fishing & Packing Company, when at the same time (the same year) others such as the Pacific American Fisheries were trying to secure openings on these islands and nearby where the same run of fish would be captured, and these requests were denied. As a matter of fact a small area was open on the northeast shore of Korovin Island at the request of Mr. Ed Sims of Port Townsend, Washington. This area was closed by the Department over the strong protestations of Mr. Sims at the same time the one was opened just a very short distance away on the same shore for the Korovin Fishing Co. This

was in the spring of 1933 and the regulations of that year will so show. In the year of 1933 or 1934, when the affiant was acting as Vice President and General Manager of the Alaska Pacific Salmon Co., a great many trap closures and reopenings were arranged for at the request of the Alaska Pacific Salmon Co., particularly in southeastern Alaska. In 1934 when the Pacific American Fisheries Company, International Packing Company, and others were denied locations by the Department of Commerce (Department of Interior) in the vicinity of Kupreanof Peninsula, Shumagin Island area and mainland vicinity, Capt. W. E. Harned of Aleutian Fishing & Packing Co. was granted two sites; one on the mainland near Guillimot Island, and one on the northerly end of Nagai Island. In the spring of 1938 when affiant was in the capacity of Vice President and Manager of operations for the Pacific American Fisheries Co., he addressed a letter under date of January 17, 1938, to the then Commissioner of Fisheries, Frank Bell, requesting the closing of certain trapsites then occupied by the Pacific American Fisheries, and the opening of others in lieu thereof. This letter was answered specifically in the early part of February, 1938, at which time the Commissioner indicated just which changes he would allow. The regulations for that year came out and were dated about the 15th day of February, and these changes were made effective in these regulations. At this same time other requests for openings and changes were made but disallowed.

56 During the same period in 1938, while the affiant was in Washington, D. C., he personally observed the request of the International Packing Co. for an opening on the east shore of Kupreanof Peninsula and nearby, the request for an opening of the Alaska Southern Canning Co. When the regulations came out the opening for the Alaska Southern Canning Co. was granted, while the one for the International Packing Co. was not. Being nearby, attacking the same run of fish, it is quite apparent that this was a discriminatory act on the part of the Department, just as was true in the other cases recited above. In all of these

cases, correspondence should be of record in the Bureau of Fisheries' office at Washington, which will bear out the statements herein set forth.

That since two years ago there have been no new openings for trap locations allowed in any part of Alaska, even though there have been numerous requests for such openings. Among others, the affiant has made application for locations, and although the request for such openings has been acknowledged by the Bureau of Fisheries, Department of Interior, the openings have not been allowed for in the regulations, nor has any reason been given by the Department for failure to accede to this request. It is for this reason, and being so thoroughly familiar with the Governmental procedure over so many years, and having actually arranged for the opening and closing of sites with the Bureau during all of these years, that the affiant found it necessary to bring action against the Secretary of Interior, to compel him to do what he has been doing for others.

That in consideration of all of the circumstances recited above, the result is in *practical effect* that many who wish to take part in the Alaska Salmon Industry are debarred from doing so by the manner in which the industry is regulated by the Department of Interior; that this has resulted to some extent, and particularly in the area where the affiant is making application for sites, in three large corporations maintaining a complete monopoly over the fish supply, with the cooperation and assistance of the Department of Interior in its administration and grossly unjust interpretation of the White Act, which was designed to prevent just such a result.

JOHN N. GILBERT,

Affiant.

Subscribed and sworn to before me this 12th day of November, 1940.

VIOLA S. PAGE,

(Seal)

Notary Public in and for the State of Washington, residing at Seattle.

58 STATE OF WASHINGTON,
 County of King, ss:

H. H. Waller, being first duly sworn, deposes and says: that he is the vice president and treasurer of Hubbell and Waller Engineering Co., a corporation, whose principal place of business and office is in the Alaska Building, Seattle, Washington; that he is a graduate of the University of Washington in civil engineering of the year 1917, and that his principal business since graduation has been the practice of civil engineering and surveying in the Territory of Alaska, particularly surveying work for the salmon packing industry.

That this work of surveying for the salmon packing industry has consisted of land surveys of salmon cannery sites and of a great many fish trap site surveys; that he has, either actually, during the course of the last 13 years, made the survey of, or checked and redrawn, the survey maps of nearly every fish trap site in Alaska.

That in this way he has become unusually familiar with every fish trap location in Alaska, as well as its history; that as a part of this work it has been his function as a service to his clients, to prepare drawings and handle the work of making applications to the U. S. Engineers for permits to construct said fish traps, as required by law.

That these applications each of which includes a map of the proposed fish trap site and a plan of the proposed fish trap structure, were made to the requirements of the U. S. Engineers as a requisite to the issuance of a War Department permit to construct said fish trap on said site.

That while he has always understood that the White Law of 1924 did not permit the U. S. Bureau of Fisheries to open up any particular area of shore line for any certain parties it is his belief that the U. S. Bureau of Fisheries has, on numerous occasions, opened certain fish trap sites with the intention that they should be for the benefit and use of certain parties. That this belief on his part, is based on the fact that he has, during the past 13 years, prepared hundreds of the applications to the U. S.

Engineers for War Department permits for the purpose of constructing proposed fish traps on proposed sites, wherein said proposed sites were not at the time opened by the U. S. Bureau of Fisheries for fish trap fishing, and that he has prepared and has filed these applications and maps with the U. S. Engineers on the request of certain clients and that he does know that later on some of these particular sites as outlined in said applications and maps were opened up by the U. S. Bureau of Fisheries, and that due to the fact that said client in each case had been the first to file said applications and maps with the U. S. Engineers and pay the Alaska Territorial license fee therefore that when said sites were opened up by the U. S. Bureau of Fisheries, that due to this prior filing, they were given preference over any others who might have filed later, and therefore received the War Department permit for the construction of said fish trap on the site applied for from the U. S. Engineers.

That in connection with these same applications it was his assumption, that the client in each case, had first made representations either orally or written, to the U. S. Bureau of Fisheries, requesting these proposed fish trap sites which were covered by the applications he had made to the U. S. Engineers, and that, in many cases the said client was able to make an application to the U. S. Engineers prior to anyone else due to the fact that said client had knowledge that a certain fish trap site would be shortly opened up by the next U. S. Bureau of Fisheries regulations.

60 That it has been his understanding that during the past several years that the U. S. Engineer's office did not issue more than one War Department permit for each fish trap site and that the one permit which they would issue would go to the first applicant filing an application to the U. S. Engineers for the construction of a fish trap on any certain proposed fish trap site, and that this procedure is in accordance with the Department's circularized instructions to the industry covering the applications for said permits.

That he has prepared the appended schedule listing fish trap locations in the various parts of the waters in Alaska; that these schedules are shown by districts and coast survey chart numbers on which they are listed, and that this data was drawn from the records of the Seattle office of the U. S. Engineers (District Engineer U. S. Army) showing the present owner, the original owner, and the origin of the trap site and its present status in that the latter shows whether or not the site was opened by the U. S. Bureau of Fisheries after the issuance of the 1927 U. S. Bureau of Fisheries regulations.

That said 1927 U. S. Bureau of Fisheries regulations then provided that all fish trap fishing areas were closed to fish trap fishing excepting such areas as were opened specifically by the U. S. Bureau of Fisheries. That prior to 1927 all waters were opened to fish trap fishing excepting certain specific closed areas such as near the mouths of streams, navigation beacons, etc. That it was under the procedure prior to 1927 that an applicant merely filed his application, for a War Department permit to construct a proposed fish trap, with the U. S. Engineers' office, and that if in the opinion of said U. S. Engineers, such proposed structure did not constitute a menace to navigation that the permit

61 was forthwith issued, and that the practice was that after the receipts of the said permit the permittee would either tell or write the U. S. Bureau of Fisheries setting forth that the permittee had secured a War Department permit from the U. S. Engineers for the construction of a fish trap on a certain location, and would therefore erect said fish trap. That the procedure prior to 1927 was opposite to that now in use.

H. H. WALLER.

Subscribed and sworn to before me this 6th day of November, 1940.

(Seal)

E. E. STEINER,
Notary Public in and for the State
of Washington, residing at Seattle.

62

CHART NO. 8201.

Sumner Strait & Frederick Sound.

Present Owner	Original Owner	Origin	Status
1. Alaska Pacific Salmon	Same	New 1938	Opened by U. S. B. F.
2. Sebastian Stuart Fish Co.	Same	New 1938	" "
3. Alaska Pacific Salmon	Same	Before 1927	Old Trap
4. Pacific American Fish.	Petersburg Pkg. Co.	" "	" "
5. Alaska Pacific Salmon	Same	" "	" "
6. Libby, McNeill & Libby	Same	" "	" "
7. Libby, McNeill & Libby	Same	" "	" "
8. Libby, McNeill & Libby	Same	" "	" "
9. Sebastian Stuart Fish	Same	" "	" "
10. Sebastian Stuart Fish	Same	" "	" "
11. Libby, McNeill & Libby	Same	" "	" "
12. Pacific American Fish.	Petersburg Pkg. Co.	" "	" "
13. Alaska Pacific Salmon	Same	" "	" "
14. Libby, McNeill & Libby	Same	New 1936	New trap in old hole
15. Alaska Pacific Salmon	Same	Before 1927	oldtrap
16. Alaska Pacific Salmon	Same	" "	" "
17. Libby, McNeill & Libby	Same	" "	" "
18. J. V. Davis	Same	" "	" "
19. Libby, McNeill & Libby	Same	" "	" "
20. Alaska Pacific Salmon	Same	" "	" "
21. Alaska Pacific Salmon	Same	" "	" "
22. Pacific American Fish.	Northwestern Fish.	Before 1927	" "
23. Pacific American Fish.	Karl Thiele	New 1938	Opened by U. S. B. F.
24. Alaska Pacific Salmon	Same	Before 1927	Old Trap
25. Pacific American Fish.	Northwestern Fish	" "	" "
26. Pacific American Fish.	Petersburg Pkg. Co.	" "	" "
27. Pacific American Fish.	Petersburg Pkg. Co.	" "	" "
28. O. W. Grandquist	Same	" "	" "
29. Scow Bay Pkg. Co.	O. Nicholson	" "	" "
30. Scow Bay Pkg. Co.	Same	New 1939	Opened by U. S. B. F.

63

CHART NO. 8201.

Present Owner	Original Owner	Origin	Status
31. Scow Bay Pkg. Co.	Hanseth Bros.	New about 1930	Opened by U. S. B. F.
32. Scow Bay Pkg. Co.	Hanseth Bros.	Before 1927	Old Trap
33. A. Buschmann	Same	" "	" "
34. Libby, McNeill & Libby	Same	" "	" "
35. New England Fish Co.	Same	" "	" "
36. Pacific American Fish.	Columbia River Packers	" "	" "
37. Pacific American Fish.	Diamond K. Pkg. Co.	" "	" "
38. G. C. Foster	Same	" "	" "
39. Pacific American Fish.	Diamond K. Pkg. Co.	" "	" "
40. Wrangell Pkg. Co.	Same	" "	" "
41. Wrangell Pkg. Co.	A. B. Johnson	" "	" "
42. Wrangell Pkg. Co.	Mrs. Craig Millar	" "	" "
43. Pacific American Fish.	Diamond K. Pkg. Co.	" "	" "
44. Pacific American Fish.	Diamond K. Pkg. Co.	" "	" "
45. W. M. Fraser	Same	" "	" "
46. Loveless & Sons	Same	" "	" "
47. Loveless & Sons	Same	" "	" "
48. Gunderson & Sons	Same	" "	" "
49. Gunderson & Sons	Same	" "	" "
50. Fidalgo Is. Pkg.	Same	" "	" "
51. Nakat Pkg. Co.	Same	" "	" "
52. Nakat Pkg. Co.	Deep Sea Salmon Co.	" "	" "

NOTE:

The Alaska Pacific Salmon Co. had a trap opened up at P. Barrie in Sumner Strait about 1938 and closed in 1940 by the U. S. B. F.

The U. S. B. F. opened up for Martin Kildall two trap locations on the Eastern shore of Cape Decision in 1938; he operated there in 1938 and 1939, and the U. S. B. F. closed them in 1940.

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CHART NO. 8252 (Chatham Strait).

Present Owner	Original Owner	Origin	Status
1. Pyramid Pkg. Co.	Same	New 1931	Opened by U. S. B. F.
2. Pyramid Pkg. Co.	Same	Before 1927	Old Trap
3. Pyramid Pkg. Co.	Same	" "	" "
4. Superior Pkg. Co.	Same	" "	" "
5. J. V. Davis or J. A. Berg	Same	New 1934	Opened by U. S. B. F.
6. Superior Pkg. Co.	Same	Before 1927	Old Trap
7. Hood Bay Canning Co.	Same	" "	" "
8. New England Fish Co.	Same	" "	" "
9. New England Fish Co.	Same	" "	" "
10. New England Fish Co.	Same	" "	" "
11. Peril Straits Pkg.	Same	" "	" "
12. Peril Straits Pkg.	Same	" "	" "
13. W. A. Castleton	J. Kasko	" "	" "
14. Peril Straits Pkg.	Same	" "	" "
15. Superior Pkg. Co.	Same	" "	" "
16. Libby, McNeill & Libby	Same	" "	" "
17. P. E. Harris & Co.	Same	" "	" "
18. Superior Pkg. Co.	Same	" "	" "
19. Hood Bay Canning Co.	Same	New about 1930	Opened by U. S. B. F.
20. Pyramid Pkg. Co.	Same	Before 1927	Old Trap
21. Hood Bay Canning Co.	Same	" "	" "
22. Hood Bay Canning Co.	Same	" "	" "
23. Sebastian Stuart	Same	" "	" "
24. New England Fish Co.	Same	" "	" "
25. Sebastian Stuart	Same	" "	" "
26. Sebastian Stuart	Same	" "	" "
27. Alaska Pacific Salmon	Same	" "	" "
28. G. C. Winn	Same	New 1937	New trap in old hole
29. Pacific American Fish.	Same	Before 1927	Old Trap
30. Alaska Pacific Salmon	Same	New 1938	Opened by U. S. B. F.

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CHART NO. 8252.

Present Owner	Original Owner	Origin	Status
31. Sebastian Stuart	Same	New 1938	Opened by U. S. B. F.
32. Alaska Pacific Salmon	Same	Before 1927	Old Trap
33. Pacific American Fish	Petersburg Pkg. Co.	" "	" "
34. Alaska Pacific Salmon	Same	" "	" "
35. Libby, McNeill & Libby	Same	" "	" "
37. Libby, McNeill & Libby	Same	" "	" "
36. J. V. Davis	Same	" "	" "
38. Alaska Pacific Salmon	Same	" "	" "
39. Alaska Pacific Salmon	Same	" "	" "
40. Pacific American Fish	Hoonah Pkg. Co.	" "	" "
41. Pacific American Fish	J. V. Davis	" "	" "
42. Fidalgo Is. Pkg.	Same	" "	" "
43. Pacific American Fish	Hoonah Pkg. Co.	" "	" "
44. Fidalgo Is. Pkg.	Same	" "	" "
45. Fidalgo Is. Pkg.	Fidalgo Is. Pkg. & Hoonah Pkg. Co.	New 1922	Opened by U. S. B. F.

NOTE:

The U. S. B. F. opened up a trap location for Nick Bez near Pt. Ellis in Tebenkof Bay about 1937 and closed it in 1940.

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CHART NO. 8202 (Icy Strait)

Present Owner	Original Owner	Origin	Status
1. Alaska Pacific Salmon	Deep Sea Salmon Co.	Before 1927	Old Trap
2. Alaska Pacific Salmon	Same	New 1935	Opened by U. S. B. F.
3. Alaska Pacific Salmon	Deep Sea Salmon Co.	Before 1927	Old Trap
4. Alaska Pacific Salmon	Deep Sea Salmon Co.	" "	" "
5. Pacific American Fish	Northwestern Fisheries	" "	" "
6. Pacific American Fish	Northwestern Fisheries	" "	" "
7. Pacific American Fish	Hoonah Pkg. Co.	" "	" "
8. Pacific American Fish	Same	" "	" "
9. Alaska Pacific Salmon	Deep Sea Salmon Co.	" "	" "
10. Astoria & Puget Snd.	Same	" "	" "
11. Astoria & Puget Snd.	Same	" "	" "
12. Astoria & Puget Snd.	Same	New about 1933	Opened by U. S. B. F.
13. Pacific American Fish	Same	Before 1927	Old Trap
14. Alaska Pacific Salmon	Deep Sea Salmon Co.	" "	" "
15. Alaska Pacific Salmon	Thinklet Pkg. Co.	" "	" "
16. Alaska Pacific Salmon	Deep Sea Salmon Co.	" "	" "
17. P. E. Harris & Co.	Same	" "	" "
18. Alaska Pacific Salmon	Thinklet Pkg. Co.	" "	" "
19. Astoria & Puget Snd.	Same	" "	" "
20. Astoria & Puget Snd.	Same	" "	" "
21. Pacific American Fish	Hoonah Pkg. Co.	" "	" "
22. Alaska Pacific Salmon	Deep Sea Salmon Co.	" "	" "
23. Libby, McNeill & Libby	Same	" "	" "
24. Libby, McNeill & Libby	Same	" "	" "
25. Libby, McNeill & Libby	Same	" "	" "
26. Alaska Pacific Salmon	Same	" "	" "
27. P. E. Harris & Co.	Same	" "	" "
28. Alaska Pacific Salmon	Deep Sea Salmon Co.	" "	" "
29. Superior Pkg. Co.	Same	" "	" "
30. Superior Pkg. Co.	Same	" "	" "
31. J. V. Davis	Same	New 1934	Opened by U. S. B. F.

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CHART NO. 8202 (Icy Strait)

Present Owner	Original Owner	Origin	Status
32. Superior Pkg. Co.	Same	Before 1927	Old Trap
33. J. V. Davis	H. C. Davis	" "	" "
34. Alaska Pacific Salmon	Thinklet Pkg. Co.	" "	" "
35. Alaska Pacific Salmon	Thinklet Pkg. Co.	" "	" "
36. Pacific American Fish	Hoonah Pkg. Co.	" "	" "
37. P. E. Harris & Co.	Same	" "	" "
38. P. E. Harris & Co.	Same	" "	" "
39. Alaska Pacific Salmon	Same	" "	" "
40. P. E. Harris & Co.	Same	" "	" "
41. P. E. Harris & Co.	Same	" "	" "
42. Alaska Pacific Salmon	Same	" "	" "
43. Alaska Pacific Salmon	Same	" "	" "
44. Nick Bez	Same	" "	" "
45. Alaska Pacific Salmon	Same	" "	" "
46. New England Fish	Same	" "	" "
47. Alaska Pacific Salmon	Same	" "	" "
48. W. A. Castleton	J. Kasko	" "	" "

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CHART NO. 8556 (Kodiak)

Present Owner	Original Owner	Origin	Status
1. Litnich Fish Co.	Same	New 1932	Opened by U. S. B. F.
2. San Juan F. & P. Co.	Same	Before 1930	Old Trap
3. Kodiak Fisheries Co.	Same	" "	" "
4. Kodiak Fisheries Co.	Same	" "	" "
5. Kodiak Fisheries Co.	Same	" "	" "
6. Uganih Fisheries	Same	" "	" "
7. San Juan F. & P. Co.	Same	" "	" "
8. Kodiak Fisheries Co.	Same	" "	" "
9. Kodiak Fisheries Co.	Same	" "	" "
10. Uganih Fisheries Co.	Same	" "	" "
11. San Juan F. & P. Co.	Same	" "	" "
12. Uganih Fisheries	Same	" "	" "
13. San Juan F. & P. Co.	Same	" "	" "
14. Pacific American Fish	Robinson Fisheries	" "	" "
15. Pacific American Fish	Robinson Fisheries	" "	" "
16. Alaska Packers	Same	" "	" "
17. Alaska Packers	Same	" "	" "
18. Alaska Packers	Same	" "	" "
19. Alaska Packers	Same	" "	" "
20. Pacific American Fish	Olitah Pkg. Co.	" "	" "
21. Pacific American Fish	Olitah Pkg. Co.	" "	" "
22. Alaska Packers	Same	" "	" "
23. Pacific American Fish	Olitah Pkg. Co.	" "	" "
24. Alaska Packers	Same	" "	" "

NOTE:

Traps at Cape Uyah and Cape Ugat on Kodiak Island were opened by U. S. B. F. in 1938 and 1937 respectively, for O. Hofstad, and closed in 1940 by the U. S. B. F.

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CHART NO. 8551

Prince William Sound.

Present Owner	Original Owner	Origin	Status
1. B. E. Lee	Same	Before 1930	Old Trap
2. Columbia River Packers	Same	" "	" "
3. Columbia River Packers	Same	" "	" "
4. Columbia River Packers	Same	" "	" "
5. Columbia River Packers	Same	" "	" "
6. San Juan F & P Co.	Same	" "	" "
7. Shepard Pt. Pkg. Co.	Same	New 1935	Opened by U. S. B. F.
8. San Juan F & P Co.	Alaska Pacific Salmon	New 1935	" "
9. San Juan F & Co.	Same	" "	" "
10. San Juan F & P Co.	Alaska Pacific Salmon	" "	" "
11. San Juan F & P Co.	Same	" "	" "
12. San Juan F & P Co.	Same	New 1935	" "
13. Pacific American Fish	Booth Fisheries	Before 1930	Old Trap
14. Pioneer Canneries	Same	" "	" "
15. Pioneer Canneries	Same	" "	" "
16. Pacific American Fish	Same	" "	" "
17. Pacific American Fish	Same	" "	" "
18. Shepard Pt. Pkg.	Same	" "	" "
19. Premier Salmon Co.	Same	" "	" "
20. Premier Salmon Co.	Same	" "	" "
21. Shepard Pt. Pkg. Co.	Same	" "	" "
22. New England Fish Co.	Same	" "	" "
23. Pioneer Sea Foods	Same	" "	" "
24. Pioneer Canneries	Same	" "	" "
25. New England Fish Co.	Same	" "	" "
26. W. J. King-W. J. Crocker	Same	" "	" "
27. Pioneer Sea Foods	Same	" "	" "
28. New England Fish Co.	Same	" "	" "
29. Pioneer Sea Foods	Same	" "	" "
30. Shepard Pt. Pkg. Co.	Same	" "	" "

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CHART NO. 8551

Present Owner	Original Owner	Origin	Status
31. Premier Salmon Co.	Same	Before 1930	Old Trap
32. Pacific American Fish	Booth Fisheries	" "	" "
33. New England Fish Co.	Same	" "	" "
34. Shepard Pt. Pkg. Co.	Same	" "	" "
35. San Juan F & P Co.	Alaska Pacific Salmon	" "	" "
36. Shepard Pt. Pkg. Co.	Same	" "	" "
37. Shepard Pt. Pkg. Co.	Same	" "	" "
38. San Juan F & P Co.	Same	" "	" "
39. Shepard Pt. Pkg. Co.	Same	" "	" "
40. Pacific American Fish	Booth Fisheries	" "	" "
41. San Juan F & P Co.	Same	" "	" "
42. Columbia River Packers	Same	" "	" "

NOTE:

No unaccountable openings have been made in Prince William Sound so far as we know.

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CHART NO. 8553

Upper Cook Inlet

Present Owner	Original Owner	Origin	Status
1. E. J. Fribrock	Same	Before 1930	Old Trap
2. Snug Harbor Pkg. Co.	Same	" "	" "
3. D. S. Tobias	Same	" "	" "
4. Libby, McNeill & Libby	Same	" "	" "
5. Myrtle M. Everett	Koch & Everett	" "	" "
6. Myrtle M. Everett	Koch & Everett	" "	" "
7. U. S. Bur. Education	Same	" "	" "
8. S. M. Bracket	Magill (Alaska Gen. Fish)	" "	" "
9. S. M. Bracket	Magill (Alaska Gen. Fish)	" "	" "
10. H. J. Emard	Same	" "	" "
11. Oscar Vogel	Edw. Gustan	" "	" "
12. Emil Anderson	Same	" "	" "
13. Ferris or Emard	Same	" "	" "
14. H. J. Emard	Same	" "	" "
15. H. J. Emard	Same	" "	" "
16. W. F. Brown	Same	" "	" "
17. Jensen & Fidalgo Is.	Same	" "	" "
18. J. P. Hansen	Same	" "	" "
19. E. J. Fribroch	Same	" "	" "
20. Sid Lingren	Same	" "	" "
21. Anton Johnson	Same	" "	" "
22. Libby, McNeill & Libby	Same	Before 1920	" "
23. Fidalgo Is. Pkg.	Same	" "	" "
24. Fidalgo Is. Pkg.	Same	" "	" "
25. Fidalgo Is. Pkg.	Same	" "	" "
26. Pacific American Fish	Northwestern Fisheries	" "	" "
27. Libby, McNeill & Libby	Same	" "	" "
28. E. J. Fribrock	Same	Before 1930	" "
29. Pacific American Fish	N. W. Fisheries	Before 1920	" "
30. Pacific American Fish	Northwestern Fisheries	" "	" "
31. Libby, McNeill & Libby	Same	" "	" "

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CHART NO. 8553

Present Owner	Original Owner	Origin	Status
32. Pacific American Fish	Northwestern Fisheries	Before 1920	Old Trap
33. Libby, McNeill & Libby	Same	" "	" "
34. Snug Harbor Pkg. Co.	Same	Before 1930	" "
35. Paul Shadura	Same	" "	" "
36. Fidalgo Is. Pkg.	Same	Before 1920	" "
37. Libby, McNeill & Libby	Same	" "	" "
38. Cook Inlet Pkg. Co.	Same	Before 1930	" "
39. E. Caraco	Same	" "	" "
40. Libby, McNeill & Libby	Same	Before 1920	" "
41. Cook Inlet Pkg. Co.	Same	Before 1930	" "
42. E. Caraco	Same	" "	" "
43. Cook Inlet Pkg. Co.	Same	" "	" "
44. Libby, McNeill & Libby	Same	" "	" "
45. Cook Inlet Pkg. Co.	Same	" "	" "
46. Cook Inlet Pkg. Co.	Same	" "	" "
47. Snug Harbor Pkg. Co.	Same	" "	" "
48. E. J. Fribrock	Same	" "	" "
49. E. Caraco	Same	" "	" "
50. Snug Harbor Pkg. Co.	Same	" "	" "
51. E. Caraco	Same	" "	" "

NOTE:

No unaccountable openings on this chart, so far as we know.

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CHART NO. 8554

Lower Cook Inlet.

Present Owner	Original Owner	Origin	Status
1. E. J. Fribrock	Same	Before 1930	Old Trap
2. E. Caraco	Same	" "	" "
3. Libby, McNeill & Libby	Same	" "	" "
4. Cook Inlet Pkg. Co.	Same	" "	" "
5. E. Caraco	Same	" "	" "
6. Libby, McNeill & Libby	Same	" "	" "
7. Cook Inlet Pkg. Co.	Same	" "	" "
8. Cook Inlet Pkg. Co.	Same	" "	" "
9. Cook Inlet Pkg. Co.	Same	" "	" "
10. Cook Inlet Pkg. Co.	Same	" "	" "
11. Cook Inlet Pkg. Co.	Same	" "	" "
12. Cook Inlet Pkg. Co.	Same	" "	" "
13. A. Anderson	Same	" "	" "
14. Libby, McNeill & Libby	Same	" "	" "
15. Cook Inlet Pkg. Co.	Same	" "	" "
16. Ninilehik Pkg. Co.	Same	" "	" "
17. Ninilehik Pkg. Co.	Same	" "	" "
18. Ero J. Walli	Same	" "	" "
19. Fidalgo Is. Pkg.	Same	Before 1920	" "
20. Fidalgo Is. Pkg.	San Juan F & P Co.	Before 1930	" "
21. Fidalgo Is. Pkg.	San Juan F & P Co.	" "	" "
22. Fidalgo Is. Pkg.	Same	Before 1920	" "

NOTE:

No Unwarranted trap openings on this chart, so far as we know.

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CHART NO. 8802

Alaska Peninsula

Present Owner	Original Owner	Origin	Status
1. Pacific American Fish.	Same	Before 1920	Old Trap
2. Pacific American Fish.	Same	" "	" "
3. Pacific American Fish.	Same	" "	" "
4. P. E. Harris	Same	" "	" "
5. Pacific American Fish.	Same	" "	" "
6. P. E. Harris	Same	" "	" "
7. P. E. Harris	Same	" "	" "
8. Pacific American Fish.	Same	" "	" "
9. Pacific American Fish.	Same	New 1938	Opened by U. S. B. F.
10. Pacific American Fish.	Same	" "	" "
11. D. E. Hotovitsky	Same	Before 1930	" "
12. P. E. Harris	Same	" "	Old Trap
13. Pacific American Fish.	Same	" "	" "
14. Pacific American Fish.	Same	New 1938	Opened by U. S. B. F.
15. P. E. Harris	Same	Before 1930	Old Trap
16. P. E. Harris	Same	" "	" "
17. Pacific American Fish.	Same	" "	" "
18. P. E. Harris	Same	" "	" "
19. Pacific American Fish.	Same	New 1938	Opened by U. S. B. F.
20. Pacific American Fish.	Same	New 1937	" "
21. Pacific American Fish.	Same	Before 1920	Old Trap
22. Pacific American Fish.	Shunagin Pkg. Co.	" "	" "
23. H. R. Mellick	Same	New 1932	Opened by U. S. B. F.
24. Alaska Pacific Salmon	Same	New 1933	" "
25. Korovin Is. F. & P. Co.	E. A. Sims	New 1933	" "
26. Pacific American Fish.	E. A. Sims	New 1938	" "
27. Pacific American Fish.	Northwestern Fisheries	Before 1915	Old Trap
28. Alaska Packers	Same	" "	" "
29. Alaska Packers	Same	" "	" "
30. Alaska Packers	Columbia River Packers	" "	" "

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CHART NO. 8802

Present Owner	Original Owner	Origin	Status
31. Alaska Packers	Columbia River Packers	Before 1920	Old Trap
32. Pacific American Fish.	Northwestern Fisheries	" "	" "
33. Alaska Packers	Columbia River Packers	" "	" "
34. Alaska Packers	Columbia River Packers	" "	" "
35. P. E. Harris	Same	Before 1922	" "

NOTE:

In 1936 the U. S. B. F. opened up a trap near Guillemot Is. in the Alaska Peninsula for the Aleut Fishing Co., and closed it in 1940.

In 1937 the U. S. B. F. opened up a trap near Pirate Cove on Popof Is. for the Blue Fox Fishing & Pkg. Co., and closed it in 1940.

In 1938 the U. S. B. F. opened up two traps on Fox Cape and Kupreanof Pt. on the Alaska Peninsula for the San Juan Fishing & Packing Co. and closed them in 1940.

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CHART NO. 8152

West Coast Prince of Wales

Present Owner	Original Owner	Origin	Status
1. Seow Bay Pkg. Co.	Hanseth Bros.	Before 1927	Old Trap
2. August Buschmann	Same	" "	" "
3. Libby, McNeill & Libby	Same	" "	" "
4. New England Fish Co.	Same	" "	" "
5. Nakat Pkg.	Swift Arthur Crosby Co.	" "	" "
6. New England Fish Co.	Same	" "	" "
7. Libby, McNeill & Libby	Same	" "	" "
8. Nakat Pkg.	Swift Arthur Crosby Co.	" "	" "
9. New England Fish Co.	Same	" "	" "
10. Nakat Pkg.	Same	" "	" "
11. Libby, McNeill & Libby	Same	" "	" "
12. New England Fish Co.	Same	" "	" "
13. Libby, McNeill & Libby	Same	" "	" "
14. New England Fish Co.	Same	" "	" "
15. Robert Lindenberger	Libby, McNeill & Libby	" "	" "
16. Nakat Pkg.	Same	" "	" "
17. Nakat Pkg. Co.	Same	New 1938	Opened by U. S. B. F.
18. August Buschmann	Same	New 1938	" "
19. Robert Lindenberger	Nakat Pkg. Co.	Before 1827	Old Trap
20. New England Fish Co.	Same	" "	" "
21. Libby, McNeill & Libby	Same	" "	" "
22. Libby, McNeill & Libby	Same	" "	" "
23. Libby, McNeill & Libby	Same	" "	" "
24. Nakat Pkg. Co.	Same	" "	" "
25. Nakat Pkg. Co.	Same	" "	" "
26. Libby, McNeill & Libby	Sea Coast Pkg. Co.	" "	" "
27. Nakat Pkg. Co.	Same	" "	" "
28. E. R. Carlson	Same	" "	" "
29. Alaska Pacific Salmon	Same	New 1935	Opened by U. S. B. F.
30. Alaska Pacific Salmon	Same	Before 1927	Old Trap

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CHART NO. 8152

Present Owner	Original Owner	Origin	Status
31. Nakat Pkg.	Same	Before 1927	Old Trap
32. Pacific American Fish.	Northwestern Fisheries	" "	" "
33. Pacific American Fish.	Northwestern Fisheries	" "	" "
34. Alaska Pacific Salmon	Same	New 1935	Opened by U. S. B. F.
35. Alaska Pacific Salmon	Same	Before 1927	Old Trap
36. Alaska Pacific Salmon	Same	" "	" "
37. Alaska Pacific Salmon	Same	" "	" "
38. Alaska Pacific Salmon	Same	" "	" "

NOTE:

(Grover Winn, Security Point, Dall Island
 (Opened 1937 by U. S. B. F.
 (Closed 1940 by U. S. B. F.

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CHART NO. 8102

Present Owner	Original Owner	Origin	Status
1. Nakat Packing Co.	Same	Before 1927	New about 1930
2. Pacific American Fish.	Northwestern Fisheries	Before 1927	Old Trap
3. Nakat Pkg. Co.	Southern Alaska	" "	" "
4. Anderson & Peterson	Same	1932	Opened by U. S. B. F.
5. Gravina Pkg. Co.	Same	Before 1929	Old Trap
6. Nakat Pkg. Co.	Same	" 1927	" "
7. Beegle Pkg. Co.	Same	" 1927	" "
8. Gamble Co.	Same	" 1927	" "
9. Alaska Packers Assn.	Same	" 1927	" "
10. Nakat Pkg. Co.	Same	" 1927	" "
11. Nakat Pkg. Co.	Same	" 1927	" "
12. Nakat Pkg. Co.	Same	" 1927	" "
13. Beegle Pkg. Co.	Same	" 1927	" "
14. Keller Trap Co.	Same	" 1927	" "
15. Pacific American Fisheries	Northwestern Fish.	" 1927	" "
16. Pacific American Fisheries	Northwestern Fish.	" 1927	" "
17. Fidalgo Is. Pkg.	Fidalgo Is. Pkg.	" 1927	" "
18. G. E. Paup	Sorenson	" 1927	" "
19. Pacific American Fisheries	Same	" 1927	" "
20. Fidalgo Is. Pkg.	Fidalgo Is. Pkg.	" 1927	" "
21. Pacific American Fisheries	Northwestern Fisheries	" 1927	" "
22. Lincoln Fisheries	Stuart	" 1927	" "
23. Fidalgo Is. Pkg.	Fidalgo Is. Pkg. Co.	" 1927	" "
24. Pacific American Fisheries	Northwestern Fisheries	" 1927	" "
25. Lincoln Fisheries	Same	" 1927	" "
26. Ward Cove Pkg. Co.	Same	" 1927	" "
27. Libby, McNeill, Libby	Same	" 1927	" "
28. Libby, McNeill, Libby	Same	" 1927	" "

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CHART NO. 8102

Present Owner	Original Owner	Origin	Status
29. D. O. Jenkins	Same	Before 1927	Old Trap
30. Capp & Taylor	Same	" 1927	" "
31. A. I. Pkg. Co.	A. I. Reserve	" 1927	" "
32. Brindle Trap Co.	Same	" 1927	" "
33. Brindle Trap Co.	Same	" 1927	" "
34. Otto Bindpage	Booth Fisheries	" 1927	" "
35. Eagle Trap Co.	Same	" 1927	" "
36. A. I. C. Co.	A. I. Reserve	" 1927	" "
37. A. I. C. Co.	A. I. Reserve	" 1927	" "
38. A. I. C. Co.	A. I. Reserve	" 1927	" "
39. A. I. C. Co.	A. I. Reserve	" 1927	" "
40. A. I. C. Co.	A. I. Reserve	" 1927	" "
41. A. I. C. Co.	A. I. Reserve	" 1927	" "
42. A. I. C. Co.	A. I. Reserve	" 1927	" "
43. New Eng. Fish Co.	Same	" 1927	" "
44. H. Bergmann	Same	" 1927	" "
45. Ward Cove Pkg. Co.	Same	" 1927	" "
46. Johnson Co.	Same	" 1930	" "
47. New Eng. Fish Co.	Same	" 1927	" "
48. Alaska Pacific Salmon	Same	" 1927	" "
49. Beegle Pkg. Co.	Same	" "	" "
50. Alaska Pacific Salmon	Same	" "	" "
51. New England Fish	Same	" "	" "
52. Alaska Pacific Salmon	Same	" "	" "
53. Alaska Pacific Salmon	Same	" "	" "
54. Ward Cove Pkg. Co.	Same	" "	" "
55. Ward Cove Pkg. Co.	Same	" "	" "
56. Ketchikan Pkg. Co.	Stuart	" "	" "
57. Ketchikan Pkg. Co.	Stuart	" "	" "
58. Gravina Trap Co.	Same	New 1935	Forced in between by permission U. S. B. F.
59. PAF & Payne	NWF Co. & Nakat	Before 1927	Old Trap

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CHART NO. 8102

Present Owner	Original Owner	Origin	Status
60. Alaska Pacific Salmon	Same	Before 1927	Old Trap
61. Pacific American Fish.	Smiley	" "	" "
62. Otto Anderson	Same	Prior to 1929	" "
63. Laura A. Houston	Same	" 1930	" "
64. E. Dobszinsky	Same	Before 1927	" "
65. Pacific American Fish	Northwestern Fisheries	" "	" "
66. Independent Salmon Co.	K. J. Warren	" "	" "
67. Pacific American Fish.	Northwestern Fisheries	" "	" "
68. Libby, McNeill & Libby	Same	" "	" "
69. Lynch	Same	" "	" "
70. H. Pinkerton	Alaska Pacific Salmon & K. J. Warren	" "	" "
71. Nakat Pkg.	Deep Sea Salmon	New 1938	Opened by U. S. B. F.
72. McKenzie	Same	Before 1927	Old Trap
73. Nakat Pkg.	William & L. Buschmann	1933	New trap in old hole
74. Pacific American Fish.	Northwestern Fisheries	Before 1927	Old Trap
75. Libby, McNeill & Libby	Same	" "	" "
76. Nakat Pkg. Co.	Same	" "	" "
77. Fidalgo Is. Pkg.	Same	" "	" "
78. Alaska Pacific Salmon	Same	" "	" "
79. Murphy	Same	" "	" "
80. Nakat Pkg.	Same	" "	" "
81. Dixon Entrance	Same	" "	" "
82. Pacific American Fish.	Northwestern Fisheries	" "	" "
83. Nakat Pkg.	Deep Sea Salmon	New 1934	By U. S. B. F.
84. Nakat Pkg.	Same	Before 1927	Old Trap
85. Fidalgo Is. Pkg.	Same	" "	" "
86. Gunderson	Same	" "	" "
87. Wrangell Pkg. Co.	Same	" "	" "
88. Pacific American Fish.	Columbia River Packers	" "	" "
89. Foster	Same	" "	" "

81

CHART NO. 8102

Present Owner	Original Owner	Origin	Status
90. Pacific American Fish.	Diamond K.	Before 1927	Old Trap
91. Pacific American Fish.	Columbia River Packers	" "	" "
92. Nakat Pkg.	Same	" "	" "
93. Pacific American Fish.	Northwestern Fisheries	" "	" "
94. Pacific American Fish.	Northwestern Fisheries	" "	" "
95. Alaska Pacific Salmon	Same	" "	" "
96. Libby, McNeill & Libby	Same	" "	" "
97. Pete Miller	Same	" "	" "
98. Lloyd Balcolm	Reed Bros.	" "	" "
99. Alaska Pacific Salmon	Same	" "	" "
100. C. D. Payne	Same	" "	" "
101. Amanda Anderson	Dick Anderson	" "	" "
102. Libby, McNeill & Libby	Same	" "	" "
103. New England Fish Co.	Same	" "	" "
104. Nakat Pkg.	Deep Sea Salmon Co. & Geo. Brown	" "	" "
105. Pacific American Fish	Annette Is. Canning	" "	" "
106. Nakat Pkg. Co.	Deep Sea Salmon & Geo. Brown	" "	" "
107. Nakat Pkg. Co.	Deep Sea Salmon	1935	Opened by U. S. B. F.
108. Capp & Taylor	Straits Pkg. Co.	Before 1927	Old Trap
109. J. H. Rolie	Same	" "	" "
110. New Eng. Fish Co. S	Same	" "	" "
111. Alaska Pacific Salmon	Same	" "	" "
112. Alaska Pacific Salmon	Same	" "	" "
113. Alaska Pacific Salmon	Same	" "	" "
114. W. S. Balcolm	Alaska Packers	" "	" "
115. Alaska Pacific Salmon	Same	1938	Opened by U. S. B. F.
116. Alaska Pacific Salmon	Same	Before 1927	Old Trap
117. Pacific American Fish	Same	" "	" "

82

CHART NO. 8102

Present Owner	Original Owner	Origin	Status
118. Alaska Pacific Salmon	Same	" "	" "
119. Gore & Jenkins	Sales, Jenkins & Gore	" "	" "
120. Alaska Pacific Salmon	Same	1935	Opened by U. S. B. F.
121. Pacific American Fish	Northwestern Fisheries	Before 1927	Old Trap
122. Pacific American Fish	Northwestern Fisheries	" "	" "
123. Nakat Pkg.	Same	" "	" "
124. Alaska Pacific Salmon	Same	" "	" "
125. Alaska Pacific Salmon	Same	New 1935	Opened by U. S. B. F.
126. Alaska Pacific Salmon	Same	Before 1927	Old Trap
127. Alaska Pacific Salmon	Same	" "	" "
128. Alaska Pacific Salmon	Same	" "	" "

NOTE:

The following traps were opened and then closed by U. S. B. F.:

(Ira Kelly, Caamano Pt. (Closed in 1940—operated 2 years.	New 1938	Opened by U. S. B. F.
(F. & M. Fish Co., Island Pt. (Closed in 1940—operated 2 years.	New 1938	Opened by U. S. B. F.

83 STATE OF WASHINGTON,
 County of King, ss:

S. Chase, Jr., being duly sworn deposes and says: That his home address is 4531 36th Street N. E., Seattle Washington; that he has been connected with the salmon fishing industry in the State of Washington and in Alaska for upwards of 35 years last past; that his interest and association with the industry has been that of a proprietor and/or an executive of the business, and is very familiar with the catching and harvesting and processing of salmon. That he is especially familiar with the manner in which fish trap sites have been applied for and granted by the Department of Interior, U. S. Fish and Wild Life Service, (formerly Department of Commerce, U. S. Bureau of Fisheries) since he has been engaged in the salmon canning industry, and more particularly, the effect of the White Act and its subsequent effect since its passage.

That in the fall of 1932 deponent, as was the usual custom, applied verbally to the then Commissioner of Fisheries, one Henry O'Malley, for the opening up of two trap site areas, for fishing, on the south shore of the Alaska Peninsula, Western Alaska. That the said Commissioner of Fisheries promised and agreed to open up, on verbal application, two certain areas for trap fishing. That deponent, depending upon the said Commissioner's word of honor and verbal agreement to open up to trap fishing two certain trap site areas, that the deponent thereupon applied in the usual manner to the local U. S. District Engineers' office, U. S. Army, filing blue prints, etc. for the two fish trap sites, and that he likewise applied and paid the usual fees for fish trap licenses to the Territorial Treasurer, Juneau, Alaska.

84 And that shortly thereafter, predicated upon the promise of the said Commissioner to open up the aforesaid sites and the depositing of his application and blue prints with the District Engineers' office, and paying his license fees and receiving two licenses from the Ter-

ritorial Treasurer, that he constructed a cannery plant, dock, etc. at Ivanoff Bay, south shore Alaska Peninsula, for the sole purpose of processing the fish he anticipated he would harvest from the fish trap sites, as aforesaid.

That the said two fish trap sites applied for were never opened up to commercial fishing by Commissioner O'Malley, but that two fish trap sites in the same general vicinity were opened up to commercial fishing in 1938. That Commissioner O'Malley was replaced by U. S. Fish Commissioner Frank T. Bell in 1933, and it was this latter Commissioner of Fisheries that opened up the two fish trap sites for commercial fishing in the same general vicinity on the south shore of the Alaska Peninsula, where he, the deponent, had originally applied. That since the year 1932 to 1940, inclusive, deponent has applied verbally and in writing each year to the U. S. Bureau of Fisheries for two fish trap sites to be opened to commercial fishing, and likewise applied to the District Engineer for a permit and to the Territorial Treasurer of Alaska for a license.

That deponent obviously had priority of privilege since he had filed first for two openings of fish trap sites on the south shore of the Alaska Peninsula, and through the arbitrary conduct and gross discrimination in the opening of two other fish trap sites to another party five years after the deponent had originally applied for same, that his plant and large investment has laid dormant ever since, and the entire investment frozen and bearing no income whatsoever.

That the records in the office of the U. S. Bureau of Fisheries and in the office of the local district Engineer,
 85 U. S. Army, Seattle, Washington, and the records in the office of the Territorial Treasurer, Juneau, Alaska, are the best evidence and will substantially confirm statements made herein.

It is the opinion of the deponent that this is a case unquestionably of gross discrimination and the unlawful exer-

cise of authority by the Secretary of Interior, as provided for in the White Law of 1924.

S. CHASE, JR.

Subscribed and sworn to before me this 7th day of November, 1940.

WINONA DAY,
Notary Public in and for the State
of Washington, residing at Seattle.

86 STATE OF WASHINGTON,
 County of Grays Harbor, ss:

Mr. E. A. Sims, being duly sworn deposes and says: That his home address is Port Townsend, Washington; that he has been connected with the salmon fishing industry in the State of Washington and in Alaska for the past 40 years; that he is familiar with the manner in which trap sites have been granted by the Department of the Interior, Bureau of Fisheries, for the past thirty-five years, and more particularly, the effect of the White Act and its subsequent effect since its passage.

That he made application in the year 1932 or 1933 for the opening of a trap site on the northeast shore of Korovin Island, in the Shumagin Island group near the Alaska Peninsula, and that such opening was allowed. When preparations were made for the construction of a trap in this area in the spring of 1933, the Bureau of Fisheries, Department of Interior, arbitrarily and unjustly closed this area over the strong protestations of the affiant, and did at the same time open an area within one and one-half miles on the same shoreline for the Korovin Island Fishing & Canning Company. A record of the correspondence of this transaction should be on file in the Bureau of Fisheries' office, Department of Interior. It is the opinion of the affiant that this was a case of gross discrimination and the

unlawful exercise of authority by the Secretary of Interior, as provided by the White Law of 1924.

E. A. SIMS,
Affiant.

Subscribed and sworn to before me this 7th day of November, 1940.

M. A. JACKLENISE,
Notary Public in and for the State of
Washington, residing at Aberdeen.

87 STATE OF WASHINGTON,
 County of King, ss:

Mr. C. A. Burckhardt, being duly sworn, deposes and says: That his home address is 3956 East Olive Street, Seattle, Washington, and he has been connected with the salmon canning industry in Alaska continuously since 1906; that his interest and association of the industry has been that of a proprietor of the business in which as many as seven different operating units or plants were conducted throughout Alaska at various points, under the management of affiant.

That in the course of this experience all phases of fishing operations, including the prospecting for trap sites, the securing of War Department permits, and the dealing with governmental officials, in particular officials of the U. S. Department of Fisheries, was carried on toward the end of securing trap locations and other changes in the fishing regulations which from time to time seemed advisable and/or necessary to the affiant. That in particular this affiant as a result of financial difficulties along about 1930 found himself unable to continue the operation of his salmon cannery in Alaska, and in accordance with the then prevailing regulations of both the War Department and the Bureau of Fisheries, orally and in writing made request of the then U. S. Commissioner of Fisheries, Mr. Henry O'Malley, that he close to commercial fishing certain areas in

Southeastern Alaska, which were then opened to commercial fishing and upon which were located trap sites for which the affiant held War Department permits. The basis of this request was that the affiant was financially unable to operate his properties and therefore requested that these shore areas be closed to trap fishing, and with the further understanding that if and when the affiant was able
 88 to rehabilitate his financial condition and secure the necessary finances for continued operations, that the U. S. Bureau of Fisheries would either reopen these shore areas to trap fishing for the affiant, or would open other areas suitable to the affiant.

That in accordance with this understanding and that in the year 1938 two trap locations were opened for the affiant on the southerly shore of Kuiu Island, just north and east of Cape Decision, on the north shore of the outer entrance to Sumner Straits to southeast Alaska.

This statement of facts is given by the affiant for the purpose of showing that the U. S. Bureau of Fisheries does open and close certain shore line areas for trap fishing at the request of certain firms or individuals.

C. A. BURCKHARDT.

Subscribed and sworn to before me this 8th day of November, 1940.

VIOLA S. SAGE,
Notary Public in and for the State
 of Washington, residing at Seattle.

* * * * *

102 Order dismissing Action as to Harold L. Ickes,
 Secretary of the Interior, Filed March 14, 1941.

The above-entitled causes having come on for final hearing upon the complaint filed, as variously amended, and upon the motion to dismiss filed by the defendant Harold L. Ickes, as Secretary of the Interior, and the parties having appeared in open court by their respective attorneys, upon due submission and full argument and upon careful

consideration, the Court being fully advised in the premises, it is hereby

Ordered, Adjudged and Decreed, this 14th day of March, 1941, that the action herein is hereby dismissed as to the defendant Harold L. Ickes, Secretary of the Interior.

Wherefore, it is considered that the plaintiff, as against said defendant, takes nothing by this suit, and said defendant goes hence without day.

* * * * *

JENNINGS BAILEY,

Justice.

105 Order dismissing action as to Henry L. Stimson, Stimson, Secretary of War, Filed March 26th 1941.

This cause came on to be heard at this time, and thereupon and in consideration thereof, it is by the Court this 26th day of March, 1941.

Ordered, That the motion of the defendant Henry L. Stimson, Secretary of War, to dismiss the complaint, be, and the same hereby is, granted; and it is further

Ordered, That the complaint be, and the same hereby is, dismissed.

BAILEY,

Justice.

**BRIEF AND APPENDIX FOR HAROLD L. ICKES,
SECRETARY OF THE INTERIOR, APPELLEE**

**In the United States Court of Appeals
for the District of Columbia**

No. 7911

WILBUR E. DOW, APPELLANT

v.

**HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND
HENRY L. STIMSON, SECRETARY OF WAR, APPELLEES**

**APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA**

NATHAN R. MARGOLD,

Solicitor for the Department of the Interior,

LELAND O. GRAHAM,

Assistant Solicitor, Department of the Interior,

DAVID M. HUDSON,

Assistant Solicitor, Department of the Interior,

All of Washington, D. C.,

Attorneys for Appellee, Harold L. Ickes, Secretary of the Interior.

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**In the United States Court of Appeals
for the District of Columbia**

No. 7911

WILBUR E. DOW, APPELLANT

v.

**HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND
HENRY L. STIMSON, SECRETARY OF WAR, APPELLEES**

*APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA*

**BRIEF FOR HAROLD L. ICKES, SECRETARY OF THE INTERIOR,
APPELLEE**

COUNTERSTATEMENT OF THE CASE

This is an appeal by the plaintiff, Wilbur E. Dow, from separate orders of the District Court of the United States for the District of Columbia (Appellant's App. 42, 43) dismissing his reamended complaint (Appellant's App. 1) as to each of the appellees on separate motions filed by appellees (Appellees' App. 36, 38). By his reamended complaint, appellant sought to enjoin appellee Secretary of the Interior from carrying into effect certain regulations governing the fisheries of the United States in the

waters of Alaska, issued by him pursuant to the authority of the act of June 6, 1924, ch. 272 (43 Stat. 464), as amended June 18, 1926, ch. 621 (44 Stat. 752), U. S. C. title 48, secs. 221-4; to require said appellee to issue certain regulations opening to salmon fishing by traps either certain specified areas of the coast line of Alaska or general areas of such coast line from which appellant might select a site or sites for trap fishing; and to enjoin appellee Secretary of War from issuing only one War Department permit for any given site open to trap fishing in the waters of Alaska.

On May 3, 1940, appellant filed his original complaint against appellee Secretary of the Interior alone (Tr. 1). On July 2, 1940, said appellee filed his motion to dismiss appellant's complaint (Tr. 6). On October 4, 1940, the court below ordered the complaint dismissed, with leave to the appellant to file an amended complaint and to join additional parties defendant (Tr. 31).

On November 19, 1940, appellant filed an amended complaint without, however, joining any additional party defendant (Tr. 33). The amended complaint was accompanied by certain affidavits (Appellant's App. 9-26, 38-42). On January 17, 1941, appellee Secretary of the Interior filed motions to strike the affidavits filed and to dismiss the amended complaint (Appellees' App. 36). Thereafter the court below granted leave to appellant to file a further amended complaint joining the Secretary of War, and permitted argument of the motions filed by appellee Secretary of the Interior independently of any pleading

or argument on behalf of appellee Secretary of War (Appellees' App. 37). On February 19, 1941, appellant filed his reamended complaint in which he joined appellee Secretary of War as a party defendant (Appellant's App. 1).

After argument on behalf of appellee Secretary of the Interior, the court below on March 14, 1941, dismissed the reamended complaint as to appellee Secretary of the Interior (Appellant's App. 42).

Thereafter, appellee Secretary of War filed a motion to dismiss appellant's reamended complaint (Appellees' App. 38), and on March 26, 1941, the court below dismissed the reamended complaint as to said appellee (Appellant's App. 43).

The above orders of March 14, 1941, and March 26, 1941, are the subjects of this appeal.

STATUTES, TREATIES, REGULATIONS, OR RULES INVOLVED

The statutes and regulations involved are—

1. Section 1 of the act of June 6, 1924, ch. 272 (43 Stat. 464), as amended June 18, 1926, ch. 621 (44 Stat. 752), U. S. C., title 48, secs. 221-224, set out in full in appellant's brief at pages 5 and 6.

2. Sections 1 and 3 of the act of August 24, 1912, ch. 387 (37 Stat. 512), U. S. C., title 48, secs. 21 and 24. Section 3 provides in part as follows:

That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the
 * * * game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska * * *.

3. The regulation governing the taking of salmon by trap in the Alaska Peninsula area (4 F. R. 908, 912 (D. I.) sec. 205.19) which reads in part as follows:

SEC. 205.19. *Areas open to salmon traps.* The use of any trap for the capture of salmon is prohibited, except as follows:

(a) Unimak Island: Along the coast on the west and south sides of Ikatan Bay (1) from a point on False Pass (Isanotski Strait) at 54 degrees 48 minutes 54 seconds north latitude, 163 degrees 22 minutes 18 seconds west longitude, to a point at 54 degrees 46 minutes 44 seconds north latitude, 163 degrees 21 minutes 32 seconds west longitude * * *.

SUMMARY OF ARGUMENT

The argument of the appellee Secretary of the Interior is addressed to three distinct and independent grounds upon which it is contended that the judgment of the court below should be affirmed.

I

The court below lacked jurisdiction over the subject matter of the action because it is an attempt to sue the United States without its consent.

As is pointed out specifically hereinafter, under section 1 of the act of June 6, 1924, ch. 272 (43 Stat. 464) as amended June 18, 1926, ch. 621 (44 Stat. 752), U. S. C., title 48, secs. 221 to 224, the appellant cannot be granted, nor can he in any manner acquire, rights in the fisheries of Alaska different from those which are enjoyed by every other member of the public. The only right which appellant has, therefore, re-

sembles the general right of every citizen to have the government administered according to law, and the courts in those circumstances will not, at the request of an individual, interfere with the performance of the functions committed to the Executive branch of the Government in a suit to which the United States is not, and cannot be made, a party. *Morrison v. Work*, 266 U. S. 481 (1925); *Louisiana v. McAdoo*, 234 U. S. 627 (1914).

II

The reamended complaint does not state a claim against the appellee Secretary upon which relief can be granted because the appellant has no legal right which will permit him to maintain the action.

This contention is established by three propositions:

First, under section 1 of the act of June 6, 1924, as amended, *supra*, the appellant cannot be granted, nor can he otherwise acquire, any right in the fisheries of Alaska other than as a member of the public privileged to exercise the common right of fishery subject to limitation and control by the sovereign;

Secondly, the appellant's interest in the subject matter of the action being only that of a member of the public, he has no standing in court to represent the public's interest in the appellee's administration of the statute; and

Thirdly, the reamended complaint does not establish that the appellant has been or is being prevented, by any act or omission on the part of the appellee

Secretary of the Interior, from exercising, as a member of the public, the common right of fishery as limited by law. He thus fails to establish any peculiar damage resulting to him which would entitle him to relief.

In establishing the first proposition just mentioned the argument herein demonstrates (1) that the right of fishery is a common or public right and is not, in the absence of a grant from the sovereign, subject to exclusive appropriation; (2) that the fisheries in the waters of Alaska are subject to the control of Congress, and Congress has reserved that control (sec. 3 of the act of August 24, 1912, ch. 387 (37 Stat. 512), U. S. C., title 48, sec. 24) and has exercised it (sec. 1 of the act of June 6, 1924, as amended, *supra*); (3) that the act of June 6, 1924, as amended, *supra*, does not grant or permit the acquisition of any several or exclusive right of fishery in Alaska, but rather specifically denies any such several or exclusive right, thus maintaining the right of fishery therein as a common or public right.

As to the second proposition, the right of a citizen to require that the government be administered according to law does not entitle a citizen to require judicial review of such administration. The possible damage which, under existing regulations, the plaintiff may suffer by being anticipated by others in the exercise of the public right of fishery does not entitle him to review, because he can show no right to have his privileges assured to him as against the lawful acts of other members of the public. This lack of interest in the appel-

lant is not a mere matter of jurisdiction but a matter of substance which goes to the merits of the controversy.

As to the third proposition, appellant fails to show that any act or omission of the appellee Secretary prevents him from exercising any of the privileges which admittedly he has in common with other members of the public. Where the statute maintains the common right of fishery and the common law applicable thereto, the pertinent regulations likewise recognize and maintain that common right. Where the regulations permit fishing they do not deny to appellant any privilege to take part therein; where they prohibit fishing the prohibition applies to all persons. Appellant can point to no act of the appellee Secretary which places any restraint on the appellant different from that placed on all persons. It is admitted, by the motion to dismiss, that appellant is anticipated by others in his attempts to exercise the common right of fishery, but *there is no statute or other rule of law guaranteeing to the appellant an opportunity to participate in the fishery where, by a difference in circumstance or initiative, he is anticipated by others having equal privileges.*

III

The reamended complaint does not state a claim against the appellee Secretary upon which relief can be granted because an action does not lie to control the discretion of the appellee Secretary under the act of June 6, 1924, as amended, *supra*.

The functions vested in the appellee Secretary by that act are discretionary, requiring the use of judg-

ment based upon determined facts, and are to be exercised within the specific limits fixed by Congress in the statute. There is no ministerial duty involved here, and the appellee Secretary has not declined to take any action required by the statute. There is therefore no act for this court to require the appellee Secretary to perform. In fact, if the relief requested were granted, the court would be denying to the appellee Secretary authority specifically given him in the clearest terms, and further would be requiring the appellee Secretary to act without ascertainment of facts and the exercise of discretion—in other words, to perform an arbitrary act.

The order of the court below granted the appellee's motion to dismiss the action, but did not specifically dispose of the motion to strike the affidavits filed "in support of" the amended complaint. It is understood, however, that the court below properly declined to consider the affidavits in ruling on the motion, as they do not constitute allegations which would be admitted for purposes of a motion to dismiss.

Sheehan v. Municipal Light and Power Co. (S. D. N. Y., 1940), 1 Fed. Rules Dec. 256;

McConville v. District of Columbia (D. C. D. of C., 1938), 26 F. Supp. 295;

Shcrover v. John Wanamaker, New York (S. D. N. Y., 1939), 29 F. Supp. 650.

Further reference to the affidavits filed by appellant is not made in the argument.

ARGUMENT

I

The reamended complaint was properly dismissed for lack of jurisdiction over the subject matter because it is an attempt to sue the United States without its consent

As is pointed out in that portion of the argument contained in II, A, *infra*, the appellant has only the right which every member of the public has in the subject matter of this action. In the case of *Morrison v. Work*, 266 U. S. 481 (1925), plaintiff sued to enjoin the Secretary of the Interior from taking certain steps in the administration of certain Indian trust property. The Supreme Court of the United States affirmed the decision of this court affirming a decree of the lower court which dismissed the bill on appellee's motion, and stated at page 488:

In other words, the right of the Indians is merely to have the United States administer properly the trust assumed. It resembles the general right of every citizen to have the Government administered according to law and the public moneys properly applied. Courts have no power, under the circumstances here presented, to interfere with the performance of the functions committed to an executive department of the Government by a suit to which the United States is not, and cannot be made, a party.

In *Louisiana v. McAdoo*, 234 U. S. 627 (1914), the plaintiff State sought to bring an original petition to control the acts of the Secretary of the Treasury in the collection of import duties and particularly to re-

quire the collection of certain specified duties. In denying the application for leave to file, the court pointed out that to entertain such suits would "disturb the whole revenue system of the Government" and said at page 632:

Such suits would obviously, in effect, be suits against the United States,

after observing on page 629 as follows:

That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered.

This court has considered many cases in which actions were brought to enjoin the Secretary of the Interior from performing certain acts or to require him to perform certain acts, in some of which the contention that they were suits against the United States was unsuccessfully urged and in some of which that contention was apparently not urged at all. However, as pointed out under II, A, 3, *infra*, the instant case differs materially from those cases involving other statutes administered in the Department of the Interior. Here the appellant can point to no provision of the statute which affords him an opportunity to acquire rights, or gives the Secretary the authority to grant him rights, in the fisheries of Alaska over those enjoyed by other members of the public. He is, therefore, seeking to have the court, at his request, limit or di-

rect the acts of the executive department of the Government with respect to the property held in trust by the Government solely for the benefit of the public; in other words, as stated in the case of *Morrison v. Work*, *supra*, his interest

is merely to have the United States administer properly the trust assumed.

It is such a case that the Supreme Court has at least twice said constitutes a suit against the United States and therefore one which cannot be maintained without its consent.

II

The reamended complaint was properly dismissed for failure to state a claim against appellee upon which relief can be granted, as appellant has no legal right which will permit him to maintain the action

A. Appellant can establish no right in the fisheries of Alaska other than as a member of the public privileged to exercise the common right of fishery subject to limitation and control by the sovereign

1. The right of fishery in Alaska is a common or public right, and is not, in the absence of a grant from the sovereign, subject to exclusive appropriation.

The right of fishery in the navigable water is a common right which may be exercised by any citizen.

In *Thlinket Packing Co. v. Harris & Co.*, 5 Alaska 471 (1916), the District Court of Alaska said at page 477:

The right of fishery in the waters of the ocean, whether in the open sea, or where the waters ebb and flow over tidelands, is a public right which may be exercised by any citizen. * * *
In its very nature, the exercise of the right of

fishing in the public waters of the ocean is not, and cannot be, exclusive.

This language the court adopted from the opinion of the Supreme Court of California in the case of *Pacific Steam Whaling Co. v. Alaska Packers' Ass'n*, 138 Calif. 636, 72 Pac. 163, and the same language was quoted and applied by the Ninth Circuit Court of Appeals in *Columbia Canning Co. v. Hampton*, 161 Fed. 60 (1908). The nature of the common right of fishery and the manner of its exercise is indicated by a further quotation from the Supreme Court of California in the *Pacific Steam Whaling Co.* case, *supra*, as follows (72 Pac. at page 163):

Its exercise, no matter by whom or for what length of time, is only the exercise of a public right. There can be no possession, for the purpose of fishery, of an area of land covered by the waters of the ocean that is at all analogous to an actual possession of a tract of upland which might give the possessor a right of action against a mere trespasser. One who exercises this public right of fishery in the sea does not by that act make himself a trespasser.

The above language of the California court was quoted and relied on by the Ninth Circuit Court of Appeals in *Columbia Canning Co. v. Hampton*, *supra*, and again by the District Court of Alaska in *Columbia Salmon Co. v. Berg*, 5 Alaska 538 (1916). In each of the three Federal cases cited, the court approved and applied the quotation in deciding cases involving the operation of fish traps in Alaska.

With reference to fish trap sites, the court in the *Thlinket Packing Co.* case, *supra*, said:

As there is no statute indicating the method by which fish-trap sites in Alaska waters can be acquired, and no statute adjusting the rights of fish-trap owners *inter sese*, we are forced to inquire whether there is any general principle of law governing the case. We are urged to hold that the law of possession applies, and that he who is prior in time should be adjudged to be prior in right. No doubt that principle is to be applied so far as fish traps actually constructed are concerned, for any one who actually incloses a space of water and is in the actual use and occupation of it for fishing purposes may maintain his inclosure as against any one who cannot show a better right; but this is so because he has actual possession, a possession which, if it were land, would be called a *pedis possessio*. He has his foot upon that part of the ocean, and he is using it for the purposes for which it is fit, and consequently he has a superior right, because he is there first.

In other words, the incidents of the common right of fishery are similar to those of other common rights—principally that lawful possession may be maintained as against unlawful interference *during the period of actual physical possession*.

The title to and control of the lands under tide waters, and the right of fishery therein, are vested in the sovereign for the benefit of the whole people. This is a principle applied by the United States Supreme Court in numerous cases.

Shively v. Bowlby, 152 U. S. 1 (1894);
McCready v. Virginia, 94 U. S. 391 (1876);
Manchester v. Massachusetts, 139 U. S. 240
 (1891);
Hardin v. Jordan, 140 U. S. 371 (1891).

In the case of *Wharton v. Wise*, 153 U. S. 155 (1894), the Supreme Court said at page 173:

That State [Virginia] is the owner of the navigable waters within its limits and the lands under them, holding them in trust for the public, and authorized to pass all necessary laws for the protection of the fish therein * * *.

And in *Manchester v. Massachusetts*, *supra*, at page 258:

We think it must be regarded as established that * * * included in territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or imbedded in the soil.

A pertinent statement occurs in the opinion of the Ninth Circuit Court of Appeals in *Anderson v. Smith*, 71 F. (2d) 493 at page 494, where in upholding the right of a State to discriminate between residents and nonresidents in fixing license fees, the court said:

This right to discriminate is based upon the principle that the state owns the wild fish and game within its borders and therefore has a right to determine the conditions upon which persons may reduce the same to possession and ownership. *Geer v. Connecticut*, 161 U. S. 519, 521 * * *.

The complete character of the rights of the sovereign is indicated in the opinion of the Supreme Court in *McCready v. Virginia, supra*, at page 394:

The principle has long been settled in this court, that each State owns the beds of all tidewaters within its jurisdiction, unless they have been granted away. * * * In like manner, the States own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. * * * These [the fisheries] remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tidewaters and their beds to be used by its people as a common for taking and cultivating fish * * *. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property.

And this right of fishery remains a public or common right until granted in severalty by the sovereign. *Martin v. Waddell*, 16 Pet. 367 (U. S. 1842).

2. The fisheries in the waters of Alaska are subject to the control of the Congress, and Congress has reserved and exercised that control.

Through its constitutional grants of power to make treaties, to declare and carry on war, and to make all needful regulations respecting the territory or other property belonging to the United States, Congress possesses plenary power, national and municipal, over the Territories.

National Bank v. County of Yankton, 101 U. S. 129 (1879);

Downes v. Bidwell, 182 U. S. 244 (1901);

Mormon Church v. United States, 136 U. S. 1 (1890);

Hawaii v. Mankichi, 190 U. S. 197 (1903).

Alaska is one of the Territories of the United States and is therefore subject to the exercise of such plenary power of Congress.

Binns v. United States, 194 U. S. 486 (1904);

Steamer Coquitlam v. United States, 163 U. S. 346 (1896);

Act of Congress of August 24, 1912, ch. 387 (37 Stat. 512), sec. 1, U. S. C., title 48, sec. 21.

The Supreme Court in *Binns v. United States*, *supra*, at page 491 pointed out that

it [Congress] may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory.

In granting to the legislature of Alaska power to alter, amend, modify, and repeal laws in force in Alaska, Congress provided in section 3 of the act of August 24, 1912, *supra*, that

The authority granted to the legislature * * * shall not extend to the * * * game, fish, and fur seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska * * *.

The Congress thus reserved its power over the fisheries of Alaska, and it has exercised that reserved power in the act of June 6, 1924, ch. 272 (43 Stat. 464), as

amended June 18, 1926, ch. 621 (44 Stat. 752), U. S. C., title 48, secs. 221-224, entitled "An Act for the protection of the fisheries of Alaska, and for other purposes." See *Anderson v. Smith, supra*. Section 1 of that act provides that "for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska," the Secretary of Commerce (now the Secretary of the Interior) is invested with certain authority over the taking of fish "in any of the waters of Alaska over which the United States has jurisdiction."

In *Anderson v. Smith, supra*, it was said at page 494:

In Alaska, however, the wild fish and game belong to the United States, except insofar as they have been given to the Territory of Alaska. In granting legislative power to the territorial Legislature * * * Congress expressly excepted therefrom the subject of game, fish and fur seals * * *.

And in *Freeman v. Smith*, 44 F. (2d) 703 (1930) (*cert. den.* 282 U. S. 904) at page 704:

* * * in the act to which we have referred, Congress has declared its purpose to be to protect and conserve the fisheries of the United States in all waters of Alaska, and has delegated to the Secretary of Commerce [now the Secretary of the Interior] full and complete authority to regulate * * * almost every detail of the fishing industry, leaving little or nothing to the territory beyond the power to impose taxes and licenses.

Thus, the right of fishery in the waters of Alaska is a common or public right over which the power of Congress is plenary and as to which the Congress has reserved and exercised its power to regulate; and the privileges of the exercise, by any individual member of the public, of the common right of fishery, are limited by the statutes enacted in the exercise of such plenary power of Congress. Therefore, if the appellant is to show in himself any right which he may assert in this action, he must show such right derived from a grant of the sovereign as evidenced by an enactment of Congress. An examination of the applicable statutes demonstrates that no such right may be established.

3. The enactments of Congress do not grant, but rather specifically deny, any several or exclusive right of fishery in the fisheries of Alaska, thus maintaining the common right of fishery.

The pertinent statute is section 1 of the act of June 6, 1924, as amended, *supra*, as set out in appellant's brief (p. 5). The common right of fishery is maintained by the proviso that "every such regulation * * * shall be of general application within the particular area to which it applies" and that "no exclusive or several right of fishery shall be granted therein."

The reamended complaint alleges in paragraph 2 (Appellant's App. 2) that the appellant has heretofore "applied to the Bureau of Fisheries" (now the Fish and Wildlife Service) for the "allocation" by the Bureau of certain sites wherein he might erect

traps for the capture of salmon in the waters of Alaska. It is the alleged denial of these so-called applications of which appellant complains, and the specific relief sought is an order requiring the Secretary to issue supplemental regulations opening to trap fishing the sites desired. The mere statement of the application made demonstrates that it could not be granted as requested, as it would be directly contrary to that proviso that "no exclusive or several right of fishery shall be granted." (See *Thlinket Packing Co. v. Harris & Co.*, *supra*, and *Canoe Pass Packing Co. v. United States*, 270 Fed. 533 (C. C. A. 9th, 1921).)

In paragraph 4 (Appellant's App. 2) of the re-amended complaint appellant seeks to establish a right to fish in the areas designated by alleging that Territorial licenses had been procured from the Treasurer of the Territory and that applications had been filed for permits from the War Department to place the structures in navigable waters. It has been squarely held that neither the Territorial license nor the War Department permit grants any right or exclusive privilege, and the holdings of the Alaska courts have been specifically with respect to fish traps.

In the *Thlinket Packing Co.* case, *supra*, the court said:

As to the territorial license: That license confers no right of property. The act of the legislature under which such licenses are granted is nothing more nor less than the imposition of a license tax on persons engaging in certain businesses, specifically (in this case) the business of fishing by means of fish traps. One does not

need a license from the territory to construct a fish trap. It is only when one engages in the business of catching fish by means of the fish trap that a license is required. The territorial treasurer would probably give as many licenses as there are people who offer to pay for them. The territory does not care where the business is conducted. It is true that the act requires the applicant to state generally the place where, but that requirement manifestly is for the mere purpose of fixing a way to identify the license granted, so that the license money may not be collected twice from the same person. There is no provision made by that act, or by any other act, whereby the officers of the territory segregate the proposed fish-trap location from the public domain, or keep any record of it as a muniment of title or evidence of property rights. The act does not purport to confer any rights, nor does it pretend to settle the conflicting claims of private individuals to the same piece of water, to be used for fishing.

* * * * *

Defendants contend that some peculiar equity or priority inures to them by virtue of the fact that their permit from the War Department antedates the War Department permit issued to plaintiff. This contention cannot be sustained. It has been repeatedly held by the courts that such permit confers no right of property. The act was passed in 1899, and is a general act for all the navigable waters of the United States. Its object and purpose is to keep such waters free from obstructions. It has nothing to do with fishing sites or trap locations, except incidentally as they may inter-

fere with navigation. The very language of the permit itself is to this effect * * *.

And it expressly refers to the decision of the Supreme Court on the subject, to wit, *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525. It is nothing more nor less than a simple statement, in substance and effect, that the person having the permit of the Secretary of War may rest assured that the general government will not raise the question that the structure which he contemplates interferes with navigation.

And in the *Columbia Salmon Co.* case, *supra*, the court said:

What effect has the issuance of said territorial license and War Department permit? On this question it was held in the recent case of the *Pure Food Fish Company*, a Corporation v. *Anacortes Fish Company*, a Corporation, by the writer, on the 3d day of June, 1916, in the First division of Alaska, that neither said license nor said permit gives the holder any property right. The permit from the War Department merely amounts to a certificate from that branch of the government that the erection of a fish trap at the point named will not interfere with navigation. The territorial license merely authorizes the holder to carry on a certain business, to wit, that of catching fish, but does not grant to the holder any place of business, any more than the issuance of a saloon license grants to the holder a building in which to conduct a saloon, or the issuance of a mercantile license a building in which to conduct a store.

* * * * *

As to defendant's not having a War Department permit, if he were otherwise rightfully in possession of said trap site, a third person ought not to be permitted to deprive him of it because he had not procured such a permit. The government itself, by proper proceedings, would be the only one who could raise the question.

Same effect: *Alitak Packing Co. v. Alaska Packers' Ass'n*, 6 Alaska 277 (1920) and *Alaska General Fisheries v. Smith*, 7 Alaska 635 (1927).

The recital in the reamended complaint that the appellant's application was denied assumes a right in the appellant to make such an application and to have it considered. There is, however, no provision in the law for the submission or consideration of any such application; and for the Secretary to consider and grant such an application for the purpose of creating an exclusive right of fishery would be contrary to the express terms of the statute as before noted.

Appellant can point to no provision of law by virtue of which he has or may acquire any right in the fishery above the common or public right therein.

The statute here applicable differs, for instance, from the Mineral Leasing Act (February 25, 1920, ch. 85 (41 Stat. 437), as amended, U. S. C., title 30, secs. 181 *et seq.*) providing for applications for oil and gas leases, and from the Homestead Law (Rev. Stat., sec. 2291, as amended, U. S. C., title 43, sec. 164) providing for applications for homestead entry.

Those statutes permit, under given conditions, the disposal of public property to individuals who qualify and who satisfy the procedural requirements designed to permit the acquisition of private rights. The statute likewise differs, for example, from a regulatory statute such as the Securities Act of 1933 (May 27, 1933, ch. 38 (48 Stat. 74), as amended, U. S. C., title 15, secs. 77a *et seq.*), providing for applications for the registration of securities. There Congress has provided for the regulation of rights already possessed by the individuals.

Under the acts above cited, an individual who has so acquired or possesses private rights has such an interest as will, in a proper case, support an action to protect that interest against unlawful invasion by an administrative officer or agency.

In the instant case, however, Congress has provided merely for the regulation of public property—the fisheries of Alaska—“for the purpose of protecting and conserving” that property. It has not provided for, but rather has prohibited, the acquisition of any individual or private rights in such property; it has left the right of fishery, as limited by the statute and by regulation, where it found it—a common or public right. The question, therefore, is whether, *as one of the public* privileged to exercise the common right of fishery, appellant has an interest therein sufficient to maintain this suit.

B. Appellant has no standing in court to represent the public's interest in the appellee's administration of the statute

The right of a citizen to require that the Government be administered according to law does not en-

title a citizen to institute a suit to require judicial review of such administration.

Fairchild v. Hughes, 258 U. S. 126 (1922);
Perkins v. Lukens Steel Co., 310 U. S. 113
 (1940).

In *Massachusetts v. Mellon*, 262 U. S. 447 (1923), the Supreme Court said at page 488:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has

sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and *not merely that he suffers in some indefinite way in common with people generally.* * * * [Italics supplied.]

This is not a case of avoiding the consequences of a statute enacted by the legislative department contrary to the organic law; but it is a case in which attack is made upon the act of the executive department in implementing an enactment of the legislature. The principle announced by the Supreme Court in the above quotation is as well applicable to the latter situation as the former; and, as has been shown above, appellant here can complain only on behalf of the public at large, not on behalf of himself in the assertion of any right which he has acquired or may acquire different from that enjoyed by every member of the public.

The right required to maintain the action is a legal right. The fact that appellant may, under present regulations, be damaged by being anticipated by others in his exercise of privileges in the public right of fishery does not give him standing in court, because he can show no right to have those privileges assured to him as against other members of the public.

Tennessee Power Co. v. Tennessee Valley Authority, 306 U. S. 118 (1939);

Alabama Power Co. v. Ickes, 302 U. S. 464 (1938);

Perkins v. Lukens Steel Co., *supra*.

In the case of *Perkins v. Lukens Steel Co.*, *supra*, after pointing out that the action by the Secretary of

Labor was not an invasion of any legal rights of the respondents, the court said:

It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. [By footnote the court cites *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U. S. 118, 137-8; *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Massachusetts v. Mellon*, 262 U. S. 447.] * * * Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law. * * *

And as to the nature of the Secretary's duty:

The Act does not represent an exercise by Congress of regulatory power over private business or employment. * * * For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. * * *

Equally in the instant case appellant can show no legal right in himself but only the interest of the public, and he has no standing in court to represent the public's interest in the Secretary's compliance with the act.

Sufficient to show that it is the public interest solely which is involved is the fact that, *if the sites were opened as requested, they would be open equally to all citizens, and regardless of how many sites were opened the appellant could lawfully be anticipated in the use of all.*

It is to be noted that lack of interest in appellant is not a mere matter of jurisdiction, but is rather a matter of substance which goes to the merits of the controversy. *General Investment Co. v. N. Y. C. R. R. Co.*, 271 U. S. 228 (1926).

C. The reamended complaint does not establish that appellant is prevented, by an act or failure to act on the part of the appellee Secretary of the Interior, from exercising the common right of fishery as limited by law

As alleged in paragraph 5 of the reamended complaint (Appellant's App. 3) the sites referred to by appellant were not included as areas open to trap fishing in the regulations promulgated by the appellee Secretary for the season of 1940.

The court will take judicial notice of the regulations promulgated pursuant to the act of June 6, 1924, as amended, *supra*, and published in the Federal Register. Federal Register Act, sec. 7, July 26, 1935, ch. 417 (49 Stat. 500, 502), U. S. C., title 44, sec. 307. The complete text of the regulations appeared in 4 F. R. 908 (D. I.), and the amendments effective February 24, 1940, appear in 5 F. R. 747 (D. I.). Pertinent portions of the regulations promulgated for the area in question are set forth herein (Ante p. 4).

The appellant alleges, as a conclusion of law (Reamended complaint, second paragraph numbered 26,

Appellant's App. 7), that in failing to permit trap fishing at the sites enumerated in the reamended complaint the appellee Secretary acted in a manner contrary to the provisions of section 1 of the act of June 6, 1924, as amended, wherein that act requires that

every regulation made by the Secretary * * * shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to fish in any area of the waters of Alaska where fishing is permitted by the Secretary.

An examination of the regulations themselves will show that they are not contrary to the above provisions of law.

The first question raised by this allegation of illegality is whether the pertinent regulations are of general application within the particular area to which they apply. Reference to the regulations demonstrates that they are of general application, as the provision in each case governing the operation of traps is that "the use of *any* trap for the capture of salmon is prohibited, except as follows:", followed by the designation of areas in which traps may be used. E. g. 4 F. R. 912 (D. I.), sec. 205.19. In this connection appellant complains that there is "no general open area for the erection of fish traps in any area of Alaska." Appellant appears to condemn the regulations for specifying the areas open to trap fishing rather than those closed to such fishing. Certainly it cannot be objectionable that the regulations be made

more useful to those concerned by specifying the particular areas where such operations *may* be carried on rather than by describing every section of the long coast line of Alaska where they may *not* be carried on. The form of the regulation is fully justified by section 1 of the act.

The second question is whether the regulations have the effect of granting any exclusive or several right of fishery. Clearly they do not. The prohibition against the operation of traps is applicable to all persons, and the exceptions permitting traps in certain areas leave those areas open alike to all persons who by law are entitled to fish in Alaska.

The third question is whether, by the regulations, any citizen is denied the right to fish where fishing is permitted in Alaskan waters. Again the question is answered in the negative on the face of the regulations. Nothing in the regulations permits fishing by persons excluding appellant—closed areas are closed to all; nothing therein denies the appellant the privilege of operating traps in any area designated for trap fishing. Not only appellant, but all persons, are prohibited from fishing by means of traps in the areas which appellant seeks to have opened.

Thus it cannot be argued that by force of the regulations appellant has any less opportunity to exercise the common right of fishery, where permitted, than has any other member of the public.

The theory of appellant's claim, as developed in the reamended complaint, appears to be that since certain areas of Alaskan waters are open to trap fish-

ing, and since other persons actually fish in such open areas, the Secretary must grant appellant's "applications" for sites on which to operate fish traps. This theory is untenable for two reasons: first, it would deny the power to regulate, expressly given by the statute, because it would require the Secretary to open any site on the application of any eligible person merely because other sites were open; secondly, it would require the opening of sites for individual applicants, contrary to the provisions of the statute that no exclusive or several right of fishery shall be granted.

Nor is the effect of the regulations, taken in conjunction with the common law governing the fisheries, to grant to any individuals any rights or privileges denied to appellant.

A fish trap site in the waters of Alaska cannot be owned, nor can it be held exclusively except during actual occupancy for the purpose of fishing.

Columbia Salmon Co. v. Berg, supra;
Alaska General Fisheries v. Smith, supra;
Alitak Packing Co. v. Alaska Packers' Ass'n,
supra.

Nor will use in prior years establish any priority, and the fact that the regulations permit trap fishing at a location where a trap existed the year before does not grant to any individual any right over any other citizen.

Columbia Salmon Co. v. Berg, supra.

Under the common law governing the exercise of the common right of fishery, he who first acquires peaceable physical possession of a location, completes

the necessary improvements with reasonable diligence, and maintains the same for a lawful purpose, requires a right against unlawful interference.

Alitak Packing Co. v. Alaska Packers' Ass'n,
supra;

Alaska General Fisheries v. Smith, supra.

Claims of possession and notice of intention to possess give no priority.

Thlinket Packing Co. v. Harris & Co., supra;
Alitak Packing Co. v. Alaska Packers' Ass'n,
supra.

The court in the *Columbia Salmon Co.* case, *supra*, said:

Regardless then of the former ownership or claim of ownership to this fish-trap site, the defendant seems to have been first in point of time in entering upon and taking physical possession of this fish-trap site, and was exercising such diligence in the erection and construction of the same as entitled him to be undisturbed therein, when the plaintiff came upon the premises and interfered with his prior possession * * *.

And in the *Thlinket Packing Co.* case, *supra*, the court held:

As there is no statute indicating the method by which fish-trap sites in Alaska waters can be acquired, and no statute adjusting the rights of fish-trap owners *inter sese*, we are forced to inquire whether there is any general principle of law governing the case. We are urged to hold that the law of possession applies, and that he who is prior in time should be adjudged

prior in right. No doubt that principle is to be applied so far as fish traps actually constructed are concerned, for anyone who actually incloses a space of water and *is in the actual use and occupation of it for fishing purposes* may maintain his inclosure as against anyone who cannot show a better right; but this is so because he has an actual possession, a possession which, if it were land, would be called a *pedis possessio*. [Italics supplied.]

Thus the previous users of fish-trap sites have acquired no higher right to such sites than has any other member of the public, and the continuance of a regulation permitting trap fishing at such site deprives appellant of no right enjoyed by any other person. He who first takes up a location and proceeds diligently to improve it and to occupy it for fishing by trap is in lawful possession thereof just as in the case of occupancy of an area for such purpose by any other form of gear, fixed or mobile. *There is no statute or other rule of law guaranteeing to appellant an opportunity to participate in the fishery where by a difference in circumstance or initiative he is anticipated by others having equal privilege*, and the statute in question is not to be distorted for that purpose.

On the allegations of the reamended complaint, therefore, in the light of the statute, the regulations, and the common law, appellant is not denied any right to partake of the common right of fishery as limited by authority of the sovereign.

III

The reamended complaint was properly dismissed for failure to state a claim against appellee upon which relief can be granted, as an action does not lie to control the discretion of the Secretary of the Interior under the applicable statute

The functions vested in the appellee Secretary by the act in question are clearly discretionary, requiring the use of judgment based upon determined facts, and are to be exercised within the limits fixed by Congress. The exercise of discretion so granted will not be controlled by the courts.

United States ex. rel. Roughton v. Ickes, 101 F. (2d) 248, 69 App. D. C. 324 (1938);

Wann v. Ickes, 92 F. (2d) 215, 67 App. D. C. 291 (1937);

United States ex rel. McLennan v. Wilbur, 283 U. S. 414 (1931);

Work v. Rives, 267 U. S. 175 (1925);

Louisiana v. McAdoo, *supra*;

Riverside Oil Co. v. Hitchcock, 190 U. S. 316 (1903).

An action in the nature of mandamus is used to compel the performance of a ministerial duty; it is also used to compel action in matters involving judgment and discretion if the relator has a right to have the action taken, but not to direct the exercise of discretionary authority in a particular way.

United States ex rel. Roughton v. Ickes, *supra*;
Wilbur v. United States ex rel. Kadrie, 281 U. S. 206 (1930).

There is no ministerial duty involved here; and the appellee Secretary has acted upon appellant's request,

although unfavorably, by his failure to designate as open areas the sites requested.

The appellant requests that the court require the appellee Secretary to open certain sites—in other words, he requests that the court control the exercise of authority in which the discretion is granted to the Secretary. This the court will not do, as held in the cases above cited.

Further, the court will not grant the relief requested because:

(1) If the court were to grant the relief here requested, then it would necessarily require the opening of any other sites requested by this appellant and any further sites requested by any or all other citizens desiring such action. But this would be to deny the authority given to the appellee Secretary in the clearest terms in the act.

(2) If the court were to grant the relief here requested, the appellant not having alleged that trap fishing at such sites would be consistent with the “purpose of protecting and conserving the fisheries of the United States,” the court not only would be controlling the exercise of discretion by the appellee Secretary but would be requiring the performance of an arbitrary act precisely similar to those alleged in paragraph 19 of the reamended complaint (Appellant’s App. 6) and there characterized as “the arbitrary, irregular and discriminatory selection by the defendant * * * based upon the application submitted by the applicant.”

The allegations in paragraph 6 of the reamended complaint (Appellant’s App. 3) that the Secretary

acted "arbitrarily, irregularly and capriciously" are allegations of conclusions of law already shown to be erroneous (II, C, *ante*). No facts are alleged to establish this characterization of the action taken. In the absence of such allegation, the presumption of regularity is applied to the acts of public officers.

Klamath and Moadoc Tribes of Indians v. United States, 296 U. S. 244 (1935);

United States v. Chemical Foundation, 272 U. S. 1 (1926);

Proctor & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246 (1938).

CONCLUSION

For all these reasons, the judgment of the District Court should be affirmed.

Respectfully submitted.

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APPENDIX

In the United States Court of Appeals for the District of Columbia

No. 7911

WILBUR E. DOW, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND
HENRY L. STIMSON, SECRETARY OF WAR, APPELLEES

APPENDIX TO BRIEF FOR HAROLD L. ICKES, SECRETARY OF
THE INTERIOR, APPELLEE

Motion to strike and motion to dismiss filed by appellee
Secretary of the Interior January 17, 1941

MOTION TO STRIKE AND MOTION TO DISMISS

The defendant moves the court to strike the affidavits filed "in support of amended complaint" because they are immaterial.

The defendant moves the court to dismiss the amended complaint

(a) for lack of jurisdiction over the subject matter because it is a suit against the United States without its consent; and

(b) for failure to state a claim upon which relief can be granted.

Order for argument of motion to strike and motion to dismiss filed by appellee Secretary of the Interior independently of pleading by appellee Secretary of War, filed February 21, 1941

The above-entitled cause, having come on to be heard on the defendant's motion to dismiss the action, (a) for lack of jurisdiction over the subject matter because it is a suit against the United States without its consent, and (b) for failure to state a claim upon which relief can be granted, and the parties hereto having appeared in open court by their respective attorneys on February 11th, 1941, and the court having been duly advised in the premises, it is hereby

ORDERED, this 21 day of February, 1941 that plaintiff's attorney be given until February 18th, 1941, to file his points and authorities with leave to the plaintiff to file an amended complaint joining the Secretary of War, and it is further

ORDERED that the motions referred to above be placed upon the motion calendar of this court for argument at 9:30 A. M. on Thursday, February 20th, 1941, at which time the solicitor for the defendant, HAROLD L. ICKES, may argue the motions above referred to without prejudice to the right of the solicitor for the Secretary of War to argue a similar motion or any motion he may care to make at a later date at a time mutually agreeable to the respective attorneys and this Honorable Court.

GOLDSBOROUGH, *Justice.*

**Motion to dismiss filed by appellee Secretary of War
March 15, 1941**

Motion to dismiss

The defendant, the Secretary of War, moves to dismiss the reamended complaint, and for grounds says:

1. The complaint fails to state a claim upon which relief can be granted.

2. The court lacks jurisdiction over the subject matter of the complaint, since the complaint, is, in effect, a suit against the United States to which the United States has not consented.

BRIEF FOR APPELLEE HENRY L. STIMSON,
SECRETARY OF WAR

In the United States Court of Appeals
for the District of Columbia

APRIL TERM, 1941

No. 7911

WILBUR E. DOW, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR; AND HENRY L.
STIMSON, SECRETARY OF WAR, APPELLEES

No. 7912

JACK N. GILBERT, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR; AND HENRY L.
STIMSON, SECRETARY OF WAR, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

NORMAN M. LITTELL,

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W. ROBERT KOERNER,

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**In the United States Court of Appeals
for the District of Columbia**

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HAROLD L. ICKES, SECRETARY OF THE INTERIOR; AND HENRY L.
STIMSON, SECRETARY OF WAR, APPELLEES

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA*

**BRIEF FOR APPELLEE HENRY L. STIMSON,
SECRETARY OF WAR**

OPINION BELOW

The district court did not write an opinion. Its orders dismissing the actions as against the Secretary of War are to be found at pages 43 of the appendices to appellants' briefs.

QUESTIONS PRESENTED

1. Whether the Secretary of War is required to pass upon applications to construct fish traps in the navigable waters

of Alaska in the absence of a showing that the proposed sites have been previously opened to trap fishing by the Secretary of the Interior.

2. Whether the appellants have any standing to challenge the Secretary of War's alleged practice of issuing only one permit for each trap site, inasmuch as their applications cover areas where no permits have been issued.

3. Whether the reamended complaints filed by the appellants allege facts which show an abuse of the broad discretion vested in the Secretary of War by the Rivers and Harbors Act of 1899.

STATEMENT

These appeals are from orders of the district court dismissing actions separately brought by each of the appellants to require the Secretary of the Interior to open certain additional sites for the erection of fish traps in the coastal waters of Alaska, and to compel the Secretary of War to desist from his present practice of permitting only one trap to be erected on each such site.

The gist of the reamended complaints, insofar as they relate to the Secretary of War, may be summarized as follows: In 1927 the Bureau of Fisheries closed all waters of Alaska to fishing by trap except such areas as might be expressly designated from year to year as available for that purpose (paragraph 18, Appellants' App. 5). In November of 1939 appellants applied to the Bureau of Fisheries (now the Fish and Wildlife Service) of the Department of the Interior for permission to erect salmon fishing traps in certain closed areas in the coastal waters of Alaska, the sites being specifically described in the applications (paragraphs 2 and 3, Appellants' App. 2). At or about this same time, appellants requested permits from the War Department for the construction of traps on the described sites, such permits being required by section 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403. which prohibits the erection of any structures in navigable waters of the United States without the permission of the Secretary of War (paragraph 4, Appel-

lants' App. 2-3). On January 6, 1940, the Secretary of the Interior issued regulations granting a number of applications for the erection of fish traps on certain sites in Alaska but disallowing those requested by appellants (paragraphs 5 and 8, Appellants' App. 3). Their applications were likewise denied by the Secretary of War on dates not specified in the pleadings (paragraph 12, Appellants' App. 4).

The complaints further stated that the Secretary of the Interior's practice of allowing fish traps to be erected in certain areas and not in others was "arbitrary, irregular, and discriminatory" (paragraph 19, Appellants' App. 6; cf. paragraph 6, Appellants' App. 3); that the Secretary of War's practice of not granting more than one permit on each site designated by the Interior Department (paragraphs 9, 10, 11, 13, 15, Appellants' App. 3-5) was contrary to the Act of June 6, 1924, c. 272, 43 Stat. 464, 48 U. S. C. sec. 222, which prohibits exclusive or several rights of fishing in Alaskan waters (paragraphs 14, 16, 17, Appellants' App. 4-5); and that these practices redounded to the advantage of large companies which had procured permits and erected traps in the past and virtually excluded newcomers from sharing in the trap-fishing industry in Alaska in contravention of the 1924 Act (paragraphs 20-26, Appellants' App. 6-7).

Appellants accordingly asked that the Secretary of the Interior be ordered forthwith to issue supplemental regulations opening additional coastal areas in Alaska to trap fishing and that the Secretary of War be ordered "to cease and desist from his present practice of issuing only one permit to a trap site" (Appellants' App. 8).

Counsel for the appellees moved to dismiss these reamended complaints on the ground that they failed to state a claim upon which relief could be granted, and that they were in effect suits against the United States to which it had not consented (Ickes' App. 38-39). The motions to dismiss were subsequently granted, and orders dismissing the actions as against the Secretary of the Interior were entered on March 14, 1941, and as against the Secretary of War on March 26,

1941 (Appellants' App. 42-43). It is from these orders that the present appeals are prosecuted.

STATUTE INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C., sec. 403, provides:

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; * * *.

SUMMARY OF ARGUMENT

1. The Secretary of War is under no duty to pass upon fish trap applications unless the requested sites have been *previously* opened to trap fishing by the Secretary of the Interior, the officer primarily charged with the responsibility of regulating fisheries in Alaska. Since the sites requested by the appellants are at present closed to trap fishing, appellants cannot complain if their applications have not heretofore been favorably acted upon by the Secretary of War. So far as appears from the complaints, the Secretary of War will consider appellants' applications if and when the requested areas are opened to trap fishing. Until that event occurs, the Secretary of War is not obliged to determine whether the proposed traps will or will not interfere with navigation. Cf. *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 796, 142 So. 747 (1932); *United States ex rel. Reynolds v. Lane*, 45 App. D. C. 50, 53 (1916).

2. Appellants have no standing to challenge the Secretary of War's practice of issuing only one permit for each trap site, and that to the first applicant, because appellants' appli-

cations cover closed areas where not even a single permit has been issued. If they succeed in having the requested areas opened by the Secretary of the Interior, for aught that appears, theirs will be the first applications in those areas, and consequently theirs will be the ones which will be approved by the Secretary of War. Hence, it is no concern of theirs that the Secretary of War will not grant a permit to a subsequent applicant in the same area. In the absence of a showing of an injury or threat to a particular right of their own, as distinguished from the public's interest in the proper administration of the law, appellants have no standing to attack the legality of some policy which does not affect them. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125 (1940).

3. In any event, the complaint fails to allege facts showing an abuse by the Secretary of War of the broad discretion vested in him by the Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403.

ARGUMENT

The briefs for the Secretary of the Interior analyze the 1924 statute providing for the regulation of fisheries in Alaska, and conclude that the lower court's orders dismissing the actions as against the Secretary of the Interior should be affirmed on three distinct grounds: (1) Because the complaints are in effect attempts to sue the United States without its consent; (2) because the complaints fail to show that appellants have any special rights of fishery which are being interfered with; and (3) because the discretion which the 1924 Act vests in the Secretary of the Interior will not be controlled by the courts. These same arguments require a similar affirmance of the orders of the district court dismissing the complaints as against the Secretary of War, and need not be further elaborated in the present brief.

There are, however, three additional and independent reasons why the complaint should be dismissed as against the Secretary of War: (1) In the first place, that officer is under no duty to pass upon fish-trap applications unless the requested sites have been previously opened to trap fishing by the Secretary of the Interior; (2) in the second place,

appellants have no standing to challenge the Secretary of War's alleged practice of issuing only one permit for each trap site, because they are applying for permits in areas where not even a single permit has been issued; and (3) in the third place, the allegations of the complaints fail to establish that the practice complained of is beyond the discretion entrusted to the Secretary of War by the Rivers and Harbors Act of 1899.

I

The Secretary of War is under no duty to pass upon fish-trap applications unless the requested sites have been previously opened to trap fishing by the Secretary of the Interior

It is the practice and policy of the Secretary of War not to determine whether proposed fish traps will or will not interfere with navigation unless the applications show that the traps are to be constructed "within areas *previously* approved by the Department of the Interior" for fish-trap operations. Cf. 5 Fed. Reg. 4579 (1940). Appellants challenge neither the wisdom nor the legality of this particular practice and the reason is not far to seek. To require the Secretary of War to pass upon applications for sites in areas which have not been theretofore opened to trap fishing by the officer primarily charged with the regulation of fisheries in Alaska would impose needless burdens on the War Department. Hence, in the interest of orderly administration, the Secretary of War can refuse to pass upon applications for fish-trap permits unless and until the applicants show that the sites have been previously opened to fishing by the Secretary of the Interior. No such showing has been made in the present cases, for it is clear from the complaints that the requested areas have been, and still are, closed to trap fishing. In fact, that is the very gravamen of the complaints against the Secretary of the Interior. In view of these circumstances, appellants cannot complain if their applications for War Department permits have not been heretofore favorably acted upon by the Secretary of War.

Even if it be decided that appellants are entitled to relief as against the Secretary of the Interior, it does not follow

that they are entitled to any decree at this time against the Secretary of War. So far as appears from the complaints, the Secretary of War will consider appellants' applications if and when the requested areas are opened to trap fishing. Until that event occurs the Secretary of War is not required to determine whether the proposed traps will interfere with navigation, and after that happening he is entitled to a decent interval in which to make his determination. Until such an interval elapses appellants are quite obviously not entitled to mandatory relief. They must first exhaust their administrative remedies. They cannot complain of a prospective or anticipated violation of duty. *United States ex rel. Reynolds v. Lane*, 45 App. D. C. 50, 53 (1916); *Wood v. State ex rel. Gillespie*, 169 Miss. 790, 796, 142 So. 747 (1932); *State ex rel. Board of Educational Com'rs. v. O'Brien*, 170 Tenn. 435, 438, 95 S. W. 2d 921 (1936); *State ex rel. Board of Education of Superior v. Hunter*, 111 Wis. 582, 588, 87 N. W. 477 (1901).

II

Appellants have no standing to challenge the Secretary of War's practice of issuing only one permit for each trap site, because their applications cover closed areas where not even a single permit has been issued

Appellants, while not objecting to the Secretary of War's practice of declining to pass upon fish-trap applications unless the areas have been *previously* opened to trap fishing, do challenge the Secretary of War's alleged practice of issuing only one permit for each trap site (Br. 14-17). But appellants have no standing to question the legality of this practice in the instant suits. Their complaints show that they are applying for permits *in areas which are now closed to trap fishing* and in which *not even a single permit has been granted*. Hence, if they succeed in having the requested areas opened by the Secretary of the Interior, the Secretary of War's practice of issuing only one permit in a given area will in no way affect them. For aught that appears, theirs will be the first applications in those areas, and consequently theirs will be the ones which will be granted. Hence, it is no concern of theirs that the Secretary of War grants only one permit for

each trap site. Since this alleged practice will not affect them, they have no standing to complain, for it is well established that courts will not decide whether officers of the United States have exceeded their authority, unless some legal rights of the complainants are shown to have been invaded or threatened by the challenged conduct. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125 (1940); *Stearns v. Wood*, 236 U. S. 75, 78 (1915); *McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 162-164 (1914). In the absence of a showing of past or threatened injury to their individual interests, the issues are entirely abstract and hence not justiciable. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 130, 132 (1940). See also the cases cited and analyzed in the briefs filed for the Secretary of the Interior, pp. 23-27.

III

The complaints fail to allege facts showing any abuse by the Secretary of War of the broad discretion vested in him by the Rivers and Harbors Act of 1899

The statutory authority of the Secretary of War to grant or deny permits to erect fish traps in Alaska waters is found in section 10 of the Rivers and Harbors Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403, which provides:

That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; * * *.

The Secretary's discretion to grant or refuse permission to erect structures in navigable waters is couched in such broad

language that a doubt has been expressed whether even an arbitrary decision by the Secretary of War is subject to judicial review. Cf. *Greenleaf Lumber Co. v. Garrison*, 237 U. S. 251, 268 (1915). We need not go so far in the instant cases, where the complaints fail to state facts or even contain allegations that the *Secretary of War's* conduct has been arbitrary or capricious. In fact, the complaints do not even allege that the practice of granting only one permit to a trap site is beyond his statutory authority. The complaints merely state (Appellants' App. 4):

11. That there is nothing in the War Department Regulations which compels the defendant, Henry L. Stimson, as Secretary of War, so to act but that same is done solely upon his own responsibility under agreement with the Secretary of the Interior as aforesaid.

This allegation clearly does not charge the Secretary of War with unauthorized conduct. Quite obviously the powers of the Secretary are not determined by the War Department Regulations. But even if the complaints were intended to charge that the statutes do not *compel* the action which the Secretary of War is taking, the allegation is immaterial, for the Secretary may have a large range of discretion outside of any action the statutes may compel him to take. As stated in *Spalding v. Vilas*, 161 U. S. 483, 498-499 (1896): "He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested."

Certainly in the absence of allegations to the contrary it must be presumed that the Secretary of War has adopted the practice complained of as a proper means of discharging his official duties, and that he refuses to issue more than one permit per trap site for a good and sufficient reason. *United States v. Chemical Foundation*, 272 U. S. 1, 14-15 (1926); *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 145 (1937); *Austin Co. v. Commissioner of Internal Revenue*, 35 F. 2d 910, 912 (C. C. A. 6, 1929).

CONCLUSION

It is therefore respectfully submitted that the orders of the district court dismissing the actions as against the Secretary of War were correct and should be affirmed.

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JUNE 1941.

